No. 05-541

IN THE

Supreme Court of the United States

Empagran, S.A. et al.,
Petitioners,

v.

F. Hoffmann-LaRoche Ltd. et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In its previous decision in this case, this Court ruled that a person may not recover under the Sherman Act for injuries incurred overseas that are wholly "independent of" the effects of the defendants' conduct in this country. This Court remanded to permit the D.C. Circuit to decide in the first instance whether a Sherman Act claim could be stated if the plaintiff's injuries were instead intertwined with the defendants' domestic conduct.

The Question Presented is:

Whether an overseas purchaser from an international cartel states a claim under the U.S. antitrust laws if its injury arose from the cartel's unlawful activities in the U.S. and the cartel intended its activities in this country to cause the injury.

RULE 29.6 STATEMENT

Respondent Empagran has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Empagran.

Respondent Nutricion has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Nutricion.

Respondent Windridge is the business name for the business owned and operated in partnership by Cynray Pty. Ltd. and Larkray Pty. Ltd. Both of these companies are proprietary limited companies, all of the shares of which are held by natural persons.

Respondent Stirol has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Stirol.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Empagran, S.A. et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-8a) is published at 417 F.3d 1267. The district court's original opinion dismissing petitioners' case (Pet. App. 88a-106a) is unpublished. The opinion of the court of appeals reversing the district court and reinstating petitioners' claims (Pet. App. 47a-87a) is published at 315 F.3d 338. This Court's opinion vacating the decision of the court of appeals and remanding to the court of appeals for further proceedings (Pet. App. 28a-46a) is published at 124 S. Ct. 2359. The initial per curiam opinion of the court of appeals on remand from this Court (Pet. App. 9a-27a) is published at 388 F.3d 337.

The court of appeals issued its opinion on June 28, 2005. On September 19, 2005, Justice Ginsburg extended the time to file this petition to and including October 26, 2005. App. No. 05A262. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

1. Section 1 of the Sherman Act (15 U.S.C. 1) provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is declared illegal.

2. The Foreign Trade Antitrust Improvements Act of 1982 (15 U.S.C. 6a) provides in relevant part:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct had a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations;

or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

3. Section 4 of the Clayton Act (15 U.S.C. 15) provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This petition for certiorari presents the significant unfinished business of *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359 (2004). This Court previously granted certiorari in this case to decide the important question whether the customers of a global cartel that operates in this country may bring suit under the U.S. antitrust laws for inju-

ries suffered as a result of purchases made outside the United States. The Court was unable to fully answer that question in the prior appeal. Instead the Court held only that if a foreign purchaser's injuries are wholly "independent of" the cartel's effects in the United States, the Sherman Act provides no remedy. The Court directed the D.C. Circuit to consider in the first instance whether a Sherman Act claim was stated when the plaintiffs' injuries are caused by the domestic effects of a cartel's conduct. On remand, however, the court of appeals disposed of that vital issue in a single paragraph of *ipse dixit*, summarily holding that such a claim is unavailable as a matter of law, even if the defendants intended their illegal conduct in the United States to injure persons overseas and even if that injury could not have occurred absent the domestic effect of that unlawful activity. This Court's failure to review that utterly opaque ruling would leave the antitrust laws in a considerable state of uncertainty and would permit defendants to escape with more than $10 *billion* dollars in illegal profits that arose directly from their unlawful conduct in this country. Certiorari should accordingly be granted.

1. The defendant-respondents in this case are U.S. bulk vitamin producers and their foreign affiliates. Together they perpetrated "the most pervasive and harmful criminal antitrust conspiracy ever uncovered." Joel I. Klein, Ass't A.G., *International Anti-Cartel Enforcement*, Speech of Sept. 30, 1999, at 5. It is undisputed that defendants' cartel extracted billions of dollars in illegal profits from U.S. consumers.

The plaintiff-petitioners are overseas direct customers of respondents. As is now relevant, plaintiffs' Sherman Act complaint relies on two essential facts. First, defendants' illegal activities in the United States were essential to maintaining the cartel's operations worldwide. Second, and closely related, the overseas effects of the cartel were a knowing and purposeful consequence of defendants' conduct in this country. In particular, the domestic restraints on competition were specifically intended to prevent plaintiffs from purchasing bulk vitamins at lower prices from the United States directly

or through intermediaries. Specifically, defendants knew that if they did not segregate the U.S. market and if they failed to fix prices in this country by reference to prices overseas, arbitrage would cause the cartel to collapse worldwide. See *infra* at 12-16 (detailing plaintiffs' allegations).

2. The U.S. District Court for the District of Columbia dismissed plaintiffs' suit for lack of subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). As relevant to this case, the FTAIA provides that the Sherman Antitrust Act, 15 U.S.C. 1 et seq., shall apply to "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" only if the defendants' conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) "such effect gives rise to a [Sherman Act] claim," *id.* § 6a. The district court held that the FTAIA requires plaintiffs to establish that their own injuries arose from the effect of the defendants' conduct on U.S. commerce. Pet. App. 92a.

Without explanation, the district court did not address plaintiffs' contention that their injuries did, in fact, arise from the effect of the defendants' conduct on U.S. commerce. In particular, plaintiffs argued that because vitamins are a fungible commodity, defendants were able to overcharge foreign purchasers only because they had succeeded in maintaining artificially high prices in the United States. Absent the anticompetitive effects in the U.S. market, foreign purchasers would have been able to refuse to pay inflated prices in foreign markets and instead purchase competitively priced products in the United States. Indeed, one of the principal purposes of the cartel's market allocation and inflation of prices in the United States was to enable it to reap billions of dollars in illegitimate profits overseas.

The D.C. Circuit reversed. The court of appeals held that "where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on

foreign commerce." Pet. App. 50a. Like the district court, the D.C. Circuit did not reach plaintiffs' argument that defendants' conduct in the United States did in fact cause their injury. *Ibid.*

3. Defendants sought review in this Court, emphasizing the importance of the question presented, and this Court granted certiorari. The principal ground for affirmance advanced by plaintiffs and their numerous *amici* was that plaintiffs' injuries were an intended consequence of defendants' unlawful market-allocation and price-fixing activities in this country. But because "[t]he Court of Appeals * * * did not address this argument," this Court directed that it be decided by the D.C. Circuit in the first instance. Pet. App. 45a.

This Court instead limited itself for the time being to reversing the D.C. Circuit's broader holding that the FTAIA permits a claim whenever the U.S. effects of defendants' conduct injure some party. This Court relied on two considerations.

First, it invoked the principle that "ambiguous statutes" should be construed "to avoid unreasonable interference with the sovereign authority of other nations." Pet. App. 34a. However, the Court recognized that it is commonplace for the federal antitrust laws to apply to overseas activities that also harm the United States, notwithstanding that those activities could be regulated by foreign governments. Congress deems the application of U.S. law appropriate, this Court explained, when U.S. interests are directly implicated:

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.

Id. 35a (emphasis in original). Indeed, the Court explained, in the FTAIA itself "Congress, of course, did make an exception [from the prohibition on Sherman Act jurisdiction] where that conduct also causes domestic harm." *Id.* 36a. In support, the Court cited the recognition in the House Report on the FTAIA that "concerns about American firms' participation in international cartels [would be] addressed through [the statute's] 'domestic injury' exception." *Ibid.*

But this Court found that the D.C. Circuit's holding swept far more broadly, permitting suit even when a defendant's conduct does *not* harm U.S. interests. In such cases, the Court concluded, "the justification for that interference [in foreign regulation] seems insubstantial." Pet. App. 35a. "[A]ny independent domestic harm the foreign conduct causes [in that circumstance] has, by definition, little or nothing to do with the matter." *Id.* 36a.

Second, this Court "found no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable" to injuries that are wholly independent of the U.S. effects of defendants' conduct. Pet. App. 39a-40a. The Court recognized that several decisions – including cases cited in the House Report on the FTAIA – held that the Sherman Act applies to foreign plaintiffs that were injured overseas. But those decisions either involved injuries that were intertwined with the U.S. effects of defendants' conduct or did not consider whether entirely independent injuries could give rise to a Sherman Act claim. See *id.* 41a-42a (in *Industria Siciliana Asfalti, Bitumi, S. p. A.* v. *Exxon Res. & Eng. Co.*, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), the "foreign injury was dependent upon, *not independent of*, domestic harm" (emphasis in original)); *id.* 42a (in *Dominicus Americana Bohio* v. *Gulf & Western Industries, Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979), "[t]he court did not separately analyze the legal problem before it in terms of independently caused foreign injury"); *ibid.* (in *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 72 (CA2 1977), "the court nowhere

considered the problem of independently caused foreign harm").

This Court acknowledged that plaintiffs had argued that "because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." Pet. App. 45a. But because the D.C. Circuit had found it unnecessary to address that contention, this Court determined that it should be considered by the court of appeals in the first instance. *Ibid.*

4. On remand, the D.C. Circuit held that plaintiffs' claims were barred by the FTAIA.[1] As an initial matter, the Court rejected defendants' argument that plaintiffs must be injured "in U.S. commerce" to fall within the FTAIA exception. That contention, the court of appeals explained, "has no support from the text of the statute, which expressly covers conduct involving 'trade or commerce with foreign nations.' In addition, the legislative history makes clear that the FTAIA's 'domestic effects' requirement 'does not exclude all persons injured abroad from recovering under the antitrust laws of the United States.'" *Id.* 4a (quoting 15 U.S.C. 6a(1)(A); H.R. Rep. No. 97-686, at 17a (1982)).

Instead, the court of appeals accepted plaintiffs' argument that the FTAIA requires simply that the U.S. effect be a "proximate cause" of plaintiffs' injury. Pet. App. 7a. The court of appeals nonetheless held as a matter of law that proximate cause was not established by plaintiffs' allegations that the domestic effects of defendants' market-allocation and price-fixing activities *in the United States* had the essential, intended effect of injuring plaintiffs. The court of appeals found it decisive that plaintiffs' injuries had more directly

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[1] In a separate opinion, the court of appeals determined that plaintiffs had properly preserved the claim that their injuries arose from the U.S. effects of defendants' conduct. Pet. App. 9a-27a.

arisen from *other* conduct of defendants overseas. The court's entire discussion of the issue was limited to a single, unelaborated paragraph, which stated in relevant part:

> Although the [plaintiffs] argue that the vitamin market is a single, global market facilitated by market division agreements so that their injuries arose from the higher prices charged by the global conspiracy (rather than from super-competitive prices in one particular market), they still must satisfy the FTAIA's requirement that the U.S. effects of the conduct give rise to their claims. The but-for causation the appellants proffer establishes only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad. *Cf. Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (CA2 2004). Under the [plaintiffs'] theory, it was the foreign effects of price-fixing outside of the United States that directly caused, or "gave rise to," their losses when they purchased vitamins abroad at super-competitive prices. *That the [defendants] knew or could foresee the effect of their allegedly anti-competitive activities in the United States on the appellants' injuries abroad or had as a purpose to manipulate United States trade does not establish that "U.S. effects" proximately caused the [plaintiffs'] harm.*

Pet. App. 7a-8a (emphasis added).

5. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court previously granted certiorari in this case to decide the important question whether and under what circumstances persons injured abroad by anticompetitive activities within the United States may bring Sherman Act claims. The Court was unable to fully answer that question because the court of appeals had failed to consider a critical aspect of that issue in the prior appeal. Accordingly, this Court ultimately decided only the narrow question whether such claims

are permitted if plaintiffs' injuries are independent of the U.S. effects of defendants' conduct. On remand, the court of appeals has now decided the important outstanding question whether such claims are permitted when plaintiffs' injuries are instead intertwined with defendants' activities in this country. That question is now ripe for resolution, and this Court's guidance is sorely needed. The failure to grant certiorari would substantially undermine the deterrent value of the federal antitrust laws and (given the inscrutable reasoning of the court of appeals) would leave the law in an unacceptable state of uncertainty.

I. Certiorari Should be Granted Because the Question Presented Is Undeniably Important, Has Been Finally Resolved by the Court of Appeals, and Has Already Been Fully Briefed in This Court Once.

In several recent cases, this Court has remanded to the court of appeals to decide in the first instance an important legal question, and then granted certiorari once again after the proceedings below concluded,[2] Such review is particularly appropriate when the issue on remand had previously been briefed in this Court. This is such a case and review is warranted once again.

This Court previously granted certiorari in this case to decide the pressing question whether and under what circum-

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[2] See, *e.g.*, *Johnson* v. *California*, 541 U.S. 428 (2004) (per curiam), after proceedings on remand, rev'd, 125 S. Ct. 2410 (2005); *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), on remand, 361 F.3d 849 (CA5 2004), rev'd sub nom. *Miller-El* v. *Dretke*, 125 S. Ct. 2317 (2005); *NOW* v. *Scheidler*, 510 U.S. 249 (1994), later proceeding, 267 F.3d 687 (CA7 2001), rev'd, 537 U.S. 393 (2003), on remand, 396 F.3d 807 (CA7 2005), cert. granted, 125 S. Ct. 2991 (2005); cf., *e.g.*, *Flanagan* v. *Ahearn*, 521 U.S. 1114 (1997) (remanding for further consideration in light of *Amchem Prods.* v. *Windsor*, 521 U.S. 591 (1997)), on remand, 134 F.3d 668 (1998), rev'd, 527 U.S. 815 (1999).

stances plaintiffs may bring Sherman Act antitrust claims for injuries suffered abroad. See 540 U.S. 1088 (2003) (granting certiorari on the question "[w]hether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce"). The Court ultimately decided only a much narrower issue, however, holding that such a claim is not permitted when the injury is wholly "independent of" the U.S. effects of defendants' conduct. Pet. App. 34a. Because the D.C. Circuit had not yet addressed whether jurisdiction existed over a claim when the plaintiff's injury was assertedly intertwined with the U.S. effects of defendants' conduct, this Court left that question to be decided in the first instance on remand. *Id.* 45a.

This Court's remand order left open the viability of the claims that are simultaneously most frequently litigated and most important to the deterrent effect of the U.S. antitrust laws: those arising from cartels. Overseas plaintiffs almost never challenge other forms of foreign anticompetitive agreements in U.S. courts, recognizing that such suits inevitably would be dismissed on grounds of comity or *forum non conveniens*. *E.g.*, *Timberlane Lumber Co.* v. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 749 F.2d 1378 (CA9 1984). By contrast, in recent years, a number of suits against cartels and similar arrangements have been filed in this country by domestic and foreign direct purchasers. The question whether such claims are permitted under the FTAIA has now been finally decided by the court of appeals and is accordingly ripe for decision in this case.[3]

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[3] In addition to this case, see, *e.g.*, *BHP New Zealand Ltd.* v. *Ucar Int'l, Inc.*, 106 Fed. Appx. 138 (CA3 Aug. 9, 2004); *Metallgesellschaft AG* v. *Sumitomo Corp. of Am.*, 325 F.3d 836 (CA7 2003); *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (CA2 2002); *Den Norske Stats Oljeselskap AS* v. *Heeremac Vof*, 241 F.3d 420 (CA5 2001); *Latino Quimica-Amtex S.A.* v. *Akzo Nobel Chems. B.V.*, No. 03 Civ 10312 (HB) (DF), 2005 U.S. Dist. LEXIS 19,788 (S.D.N.Y. Sept. 8, 2005); *In re Monosodium Glutamate Antitrust*

This Court's guidance is moreover clearly needed. The D.C. Circuit's decision is essentially barren of analysis, and fails to provide any genuine guidance in an area of recurring litigation and substantial international importance. Yet this case is closely watched not only domestically but also internationally as the bellwether of whether international cartels may be held liable under the Sherman Act for their unlawful activities. When the case was last before this Court, *amicus* briefs were submitted by an array of foreign governments and scholars of international relations and economics. Those briefs attested to the importance of the question presented, but not fully decided, in that case. The antitrust community, international competition officials, and the entities potentially subject to liability under the Sherman Act are accordingly carefully attuned not merely to the disposition, but also the rationale, of this case.

The fact that the case has already been before this Court once before on the same question also substantially buttresses the basis for granting certiorari in other ways. The resources the Court would be required to devote to deciding the important question presented would be relatively minor. The Court is already thoroughly familiar not only with the question presented, but also with the allegations underlying plaintiffs' complaint. Many *amici* supporting both plaintiffs and defendants have already mustered extensive arguments in support of the parties' competing positions. The efficiencies of resolving the issue in the context of this case are accordingly greatly enhanced.

The case is moreover an ideal vehicle to resolve the question presented. The D.C. Circuit published an opinion largely devoted to establishing that plaintiffs had preserved and fully presented the argument that their claims arise from the U.S. effects of defendants' unlawful conduct. Pet. App. 9a-27a.

Litig., Civ. File No. 00-MDL-1328 (PAM), 2005 U.S. Dist. LEXIS 8424 (D. Minn. May 2, 2005); *MM Global Servs., Inc.* v. *Dow Chem. Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004).

Defendants' conspiracy – which defendants named "Vitamins, Inc." – was a "textbook example" of a worldwide cartel. See Gary R. Spratling, Dep. Ass't A.G., *International Cartels*, Address Before the American Conference Institute 7th National Conference on Foreign Corrupt Practices Act (Dec. 9, 1999), at 13. It has been widely analyzed (including as a consequence of the criminal prosecution successfully brought by the government) and has been the subject of extensive discussion in the literature.[4]

Certiorari should accordingly be granted to finally resolve the important question that this Court previously determined to review in this case.

II. The D.C. Circuit's Ruling Seriously Misconstrues the Foreign Trade Antitrust Improvements Act of 1982 in a Manner that Conflicts with This Court's Precedents.

A. The Court of Appeals' Holding that Respondents' Unlawful Activities Were Not the Proximate Cause of Petitioners' Injuries Ignores the Obvious Purpose of Respondents' Cartel and Cannot Be Reconciled with This Court's Decision in *Pfizer*.

The D.C. Circuit summarily opined that the domestic effects of an international cartel's activities in this country could not be the "proximate cause" of the injury that the cartel causes to foreign purchasers. Pet. App. 7a-8a. Proximate

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[4] See, *e.g.*, John M. Connor, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY (2001); Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001); Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515 (2004); Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265 (2005); Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205 (2005).

cause, of course, is merely "legal cause." "[W]e use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). There is no dispute that plaintiffs are the direct victims of defendants' conduct and efficient antitrust enforcers. As the D.C. Circuit concluded in its previous opinion in this case and did not disavow in its most recent ruling:

> The foreign plaintiffs allegedly purchased vitamins at inflated prices directly from the defendants, and their injury arose from defendants' alleged conspiracy to inflate prices. The injury is direct and the claim for damages is not speculative. Allowing the foreign plaintiffs to sue does not risk duplicative recovery or complex damage apportionment. * * * The domestic plaintiffs are not more direct victims of defendants' conduct than the foreign plaintiffs, since the foreign plaintiffs have been injured just as directly as the domestic plaintiffs as a result of the defendants' conduct. Furthermore, for the reasons already explained, the foreign plaintiffs play an important role in the deterrence of the global conspiracy, a role that cannot be filled adequately by the domestic plaintiffs alone. Therefore, the foreign plaintiffs are proper plaintiffs to bring suit in this case.

Pet. App. 81a-82a.

That conclusion should have compelled the determination that the domestic effects of the defendants' conduct in this country were the proximate cause of plaintiffs' injuries. Congress contemplated that the Sherman Act would render unlawful cartel activity that harms the United States, and it imposed no geographic limitation on the remedies available in such a case, recognizing that the statute would otherwise be ineffective in deterring cartelists. As discussed below, defen-

dants' market allocation and price-fixing activities in this country were thus the "proximate cause" of plaintiffs' injuries.

1. There is no dispute that one of the purposes of the defendants' cartelization of U.S. markets was to enable defendants to charge cartel prices to purchasers worldwide. Defendants' conspiracy specifically endeavored "to eliminate competition * * * and to fix the prices and allocate markets worldwide" through "horizontal agreements * * * concerning the prices, volumes of sales, and markets" and the allocation of customers. Pl. Compl. ¶¶ 2, 4. For instance, "the North American companies agreed to leave the European vitamin markets and the European companies agreed to leave the North American vitamin markets," *id.* ¶ 94(j), and defendants also agreed "to coordinate price increases * * * throughout the United States and foreign countries," *id.* ¶ 3(a). As cartel participants admitted in documents disclosed in a vitamins trial, defendants rigorously implemented "a proposal for the global and regional allocation of sales volumes among the companies." *Animal Sci. Prods.* v. *Chinook Group*, Misc. No. 99-197, MDL 1285 (TFH), Pl. Exh. G-12, at 1. For example, defendants' market division scheme included an agreement that a principal vitamins supplier would "exit[] North America by July 1993 or sooner." *Id.*, Pl. Exh. 120. See also *id.*, Pl. Exhs. 80, 84, 108, 140, 153 (charts and maps of allocated sales). Defendants also purchased a U.S. producer's overproduction "to keep [that producer] from disrupting * * * markets outside of the United States," *id.*, Pl. Exh. G-12, at 37; and endeavored to buy out manufacturers that did not participate in the cartel, see, *e.g.*, *id.*, Pl. Exh. G-12, at 7.

Because bulk vitamins are fungible commodities that are traded on a global market, defendants' efforts to fix vitamin prices in the United States and limit trade between the United States and other countries were critical in enabling them to

extract cartel profits from plaintiffs abroad.[5] Bulk vitamins are among the class of products most susceptible to being cartelized. As detailed in the complaint, vitamins "are considered to be commodities; there is a relatively small number of producers of these vitamins; and there are high barriers of entry due to the costly and sophisticated nature of vitamin manufacturing." Pl. Compl. ¶ 75. Bulk vitamins are produced by sophisticated biotechnological processes, which are complicated and expensive to produce, making the costs of entering the market largely prohibitive. JOHN M. CONNOR, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY 1 (2001).

Bulk vitamins are also a "fungible commodity," *Interview with Gary Spratling*, ANTITRUST, Summer 2000, at 6, and can be transported across borders at little cost, Law and Economics Profs. Br. at 7 ("[B]ulk vitamins were high priced, storable commodities that were usually shipped in large quantities great distances. International shipping costs for vitamins in the 1990s were well under 5% of the manufacturers' price."). As a result, international price differentials are quickly eliminated through direct international sales and arbitrage. When arbitrageurs purchase bulk vitamins at lower prices in one country and resell them at higher prices in another country, the effect is to drive up the price in the first country and drive it down in the second until the two are equalized. See PHILLIP E. AREEDA, ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 522 (2002) ("When many sellers of the same product are earning more on one type of transaction than on another, each will attempt to divert sales to the high-profit cate-

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[5] See, *e.g.*, No. 03-724, *Amicus* Br. of Economists Joseph E. Stiglitz & Peter R. Orszag at 4-6, 12-14 ("Stiglitz & Orszag Br."); No. 03-724, *Amicus* Br. of Economics Professors B. Douglas Bernheim et al. at 3, 5-7 ("Economics Profs. Br."); No. 03-724, Sup. Ct. *Amicus* Br. of Law and Economics Professors Darren Bush et al. at 5-9 ("Law and Economics Profs. Br.").

gory, and that diversion will continue until the differential returns have been eliminated."). Thus, the competitive price for each vitamin is the same worldwide. To succeed in charging super-competitive prices, then, would-be conspirators must either fix the price on a global basis or create barriers to international commerce in vitamins. Law and Economics Profs. Br. at 2 ("[I]nternational cartels must prevent international geographic arbitrage in order to succeed in controlling prices in any targeted national market.").

Had defendants not engaged in these efforts to control the U.S. bulk vitamin trade, arbitrageurs would have undercut the cartel's prices, leading to the cartel's collapse. See Stiglitz & Orszag Br. at 4 ("[A] large international cartel in a global market will typically have to include the United States – even assuming some probability of detection and disgorgement of U.S.-based profits – or risk having its foreign profits undermined by arbitrage from trade between the U.S. market and the cartelized foreign markets."); Economics Profs. Br. at 6 ("When products can move freely between regions and countries, any attempt by a cartel to raise prices outside the United States, without affecting U.S. prices, will be restrained by profitable reallocation opportunities."); Law and Economics Profs. Br. at 8. Thus, as a consequence of "the resale by the low-price purchasers" in the United States "to the purchasers to whom the seller charges a high price" abroad, petitioners "would have no sales at [the higher price]." RICHARD A. POSNER, ANTITRUST LAW 83 (2d ed. 2001). Accordingly, when in the mid-1990s several Chinese suppliers who were not participants in the cartel began selling certain bulk vitamins in the global market, cartel prices for those vitamins promptly collapsed. CONNOR, *supra*, at 293, 325.

Defendants' efforts to fix prices in, and restrict trade with, the *United States* were *especially* vital to their ability to maintain their cartel, because U.S. consumers constitute such an enormous share (more than twenty-five percent) of the world market in bulk vitamins. CONNOR, *supra*, at 8-9; 1 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNA-

TIONAL DISPUTES IN U.S. COURTS § 5.13, at 213 (2003) (observing that the "success of the global restraint" imposed by defendants' cartel depended on its success in the United States).

And even if defendants had refrained from fixing U.S. prices and interfering with U.S. trade through their market division agreements *and* somehow managed to maintain their cartel, they still could not have charged plaintiffs the prices they did. Plaintiffs would simply have purchased bulk vitamins directly from the United States, or from arbitrageurs selling vitamins imported from the United States. Defendants' unlawful conduct thus directly prevented plaintiffs from being able to purchase vitamins from the United States. Plaintiffs' injuries were therefore by no means "independent" of the U.S. effects of defendants' conduct, Pet. App. 34a, but instead arose from those effects.

2. Defendants thus designed their cartel – including particularly their unlawful market allocation and price fixing activities in this country – precisely in order to injure persons abroad. Plaintiffs' injuries were not a remote, unpredictable, or speculative result of defendants' cartelization of the U.S. vitamins trade – rather, they were exactly the result at which defendants aimed. It is eminently fair to hold defendants liable for these intended consequences, and fairness is the essence of proximate causation. The relationship between their anti-competitive activities in the United States and plaintiffs' injuries abroad was known and foreseeable to defendants, who *deliberately* manipulated U.S. prices and trade to preserve their ability to extract cartel profits abroad. See, *e.g.*, Pl. Compl. ¶¶ 8-9; No. 03-724, *Amicus* Br. of Profs. First and Fox at 5 ("First & Fox Br.") ("The cartelists understood that the geography of buyers and sellers had nothing to do with economic effect."); *id.* at 12 ("In cartels like vitamins, the cartelists recognize that sellers from around the world must be included and sales around the world must be accounted for (as they were).").

3. The fact that defendants engaged in unlawful activities in the United States in order to affect U.S. markets as a means of injuring persons abroad establishes not merely that defendants' conduct "gives rise to" plaintiffs' claims, 15 U.S.C. 6a(1), but also that plaintiffs' claims are essential to vindicating Congress's determination to deter unlawful activity *in this country*. That is the reason that Congress intended to make plaintiffs' claims actionable under U.S. law. Congress's "goal of sanctioning cartel conduct" was "general deterrence, *i.e.*, to deter others from engaging in the offending conduct." James M. Griffin, Dep. Ass't A.G., Address Before the British Inst. Of Int'l & Comparative L. Second Ann. Conf. on Int'l & Comparative Competition Law: Trends and Tensions 6-7 (May 2002) ["Griffin Speech"]. And in particular, it would undermine the purpose of civil enforcement under the Clayton Act, which is to "enlist private plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing." Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127 (1976); see KURT RUDOLF MUROW & HARRY MAURER, WEBS OF POWER: INTERNATIONAL CARTELS AND THE WORLD ECONOMY 226 (1982) (observing that private enforcement is crucial to cartel detection); Scott D. Hammond, Dir. Of Crim. Enf., Speech of Sept. 12, 2000, at 8 (noting that "cartel members did not fear detection by U.S. or foreign antitrust authorities. In fact, they literally laughed at the very idea of it.").

In enacting the FTAIA in particular, Congress recognized the "reasons for preserving the rights of foreign persons to sue under our laws when the conduct in question has a substantial nexus to this country." H.R. REP. 97-686 at 10. Specifically, "[a]s the Supreme Court pointed out in *Pfizer* [v. *Government of India*, 434 U.S. 308 (1978)], to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust laws that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." *Ibid.*

The D.C. Circuit's holding that the Sherman Act does not subject cartelists to liability for the breadth of the harm caused by their conspiratorial activities cannot be reconciled with this Court's decision in *Pfizer*. As this Court concluded in *Pfizer*, "if foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home." *Pfizer*, 434 U.S. at 315. Defendants' contrary reliance on the fact that plaintiffs are not U.S. citizens merely confuses "the ultimate purposes of the antitrust laws with the question of who can invoke their remedies":

> The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

Id. at 314.

Indeed, plaintiffs are the only available enforcers of the antitrust laws in the circumstances of this case. Domestic direct purchasers' suits cannot account for the harm done to, and unlawful profits gained from, overseas consumers. Any domestic *indirect* purchaser who might have bought vitamins from overseas victims such as plaintiffs would be a *less* direct plaintiff whose suit would be barred by established principles of antitrust standing. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-38 (1977). Meanwhile, because defendants' cartel included all suppliers of bulk vitamins, there is no domestic competitor company who could sue, see, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 124-25 (1969); all of the U.S. companies that could have been *competitors* are in fact *co-conspirators*.

While plaintiffs are the only available enforcers who can compel defendants to disgorge their unlawful overseas profits, there are also no other available plaintiffs who could sue for the harm defendants did to U.S. export commerce through their market division agreements. As this Court previously recognized in this case, the FTAIA expressly preserved the availability of international antitrust claims in cases in which U.S. export commerce is harmed. Pet. App. 31a-32a. Here, even though each of the U.S. companies that supply bulk vitamins were part of the conspiracy, defendants indisputably interfered with and harmed U.S. export commerce; their market division plan directly barred U.S exports to regions outside North America. Thus, antitrust standing principles dictate that foreign direct purchasers' claims be permitted; otherwise, harm to them and to U.S. indirect purchasers who buy from them would go unremedied, permitting violators to "retain the fruits of their illegality." *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968).

Accordingly, the direct consequence of the D.C. Circuit's ruling in this case is that cartelists will profit from their illegal activities in this country, a result that runs directly contrary to Congress's design. Defendants paid criminal fines of approximately $2.2 billion in the United States and overseas and have settled civil lawsuits with U.S. plaintiffs for approximately $2.4 billion. See No. 03-724, *Amicus* Br. of Economics Professors B. Douglas Bernheim et al. at 9-11. But those sanctions are dwarfed by their profits during the 1990s, which are estimated, adjusted for inflation, at approximately $18 billion. See *ibid.* Thus, although defendants were apprehended and prosecuted more aggressively than any other cartel, as the law stands, they will walk away with well over $10 billion in net profits as a direct consequence of their conduct in this country. Prospective cartelists viewing these consequences will see little reason to comply with U.S. antitrust laws, particular in light of the limited prospects of even being caught in the first place. See William J. Kolasky, Antitrust Compliance Programs: The Government Perspective, Speech before

the Corporate Compliance 2002 Conference, PLI, at 4-5 (July 12, 2002) (Deputy Ass't A.G., Antitrust Div., DOJ) (available at *http://www.usdoj.gov/atr/public/speeches/11534.pdf*) (explaining the difficulty of detecting international cartels); OECD, Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws, DAFFE/COMP(2002)7, at 3 (Apr. 9, 2002), available at *http://www.oecd.org/dataoecd/16/20/2081831.pdf* (reporting that as few as one in seven of all international cartels are detected).[6]

B. This Court's Previous Decision in This Case Supports the Conclusion that the Sherman Act Renders Respondents' Conduct Actionable.

In its earlier ruling in this case, this Court took great care to distinguish the narrow case it was resolving – one in which the plaintiffs' claims were wholly "independent of" the U.S. effects of the defendants' conduct – from a case in which the plaintiffs' claims instead were intertwined with the effects of the defendants' conduct in this country. In every relevant respect, the distinctions between those classes of cases support the conclusion that defendants cannot escape liability for their unlawful conduct in this case.

1. Most important, when the plaintiffs' injuries are not intertwined with the domestic effects of the defendants' ac-

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[6] Foreign nations' cartel enforcement cannot be expected to fill this gap; the OECD has recently concluded that "larger sanctions are required to achieve effective deterrence" against cartels. OECD, Hard Core Cartels 3 (2002). See also Int'l Comp. Pol'y Adv. Comm., Final Rep't to the A.G. 186 (2000) (observing that "overall anticartel enforcement levels around the world remain fairly low outside the United States"); Griffin Speech, *supra*, at 6-7 (observing that past studies found that actual fines imposed were "less than 1% of the level necessary to deter cartel conduct. While fines have increased significantly [since then,] they are not now and never will be anywhere near the optimal fine level established by those studies.").

tivities, the Sherman Act's remedies do not directly further the interests of U.S. citizens. In such instances, a would-be conspirator's decision to engage in unlawful behavior that targets the United States is unaffected by the possibility of worldwide profits, because (assuming independence) those worldwide profits could be realized even if the United States were excluded from the conspiracy. Forcing conspirators to bear the risk of liability to foreign victims does little to deter the defendants from imposing unrelated harms on U.S. consumers. But when the U.S. effects are *not* independent but rather *gave rise to* plaintiffs' claims, deterrence is greatly undermined if foreign purchasers' claims are disallowed. In this case, to obtain cartel profits abroad, the defendants were required to inflict an injury on U.S. consumers; that is why they risked criminal and civil penalties by doing so. So long as the total benefits of the scheme (including both domestic and foreign profits) exceed the cost, defendants in such cases will have powerful incentives to continue to inflict injuries on U.S. consumers in order to obtain the benefits of cartel profits abroad. In this case, defendants' willingness to take that risk has thus far paid off, as their total U.S. criminal and civil liability has equaled less than a third of their worldwide profits. Only liability to foreign plaintiffs can force would-be conspirators to bear the *full* costs of their decision to target the U.S. market. See *supra* at 18-19.

2. In its previous decision in this case, this Court reasoned that when plaintiffs' injuries arise independent of effects in this country, application of the Sherman Act would raise substantial comity concerns, for "the justification for [the] interference [in foreign regulation] seems insubstantial." Pet. App. 35a. But this Court critically distinguished that circumstance from a case such as this one, in which application of U.S. law is necessary to prevent injuries to U.S. markets. This Court explained that "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a leg-

islative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Ibid.* (emphasis in original).

It is easy to see why the assertion of U.S. jurisdiction is clearly reasonable in this case but not when the plaintiffs' injury is independent of the effects of the defendants' conduct in the United States. In the latter case only, a serious underdeterrence problem would result: conspirators' incentive to include the United States in their scheme would be enormous unless the U.S. liability scheme is expanded to reach foreign plaintiffs' claims. If anything, a case such as this one gives rise to *fewer* comity concerns than the settled precedents to which this Court was referring – which rely on the "effects" doctrine to subject conduct that occurs abroad to the U.S. antitrust laws – because plaintiffs seek to hold defendants liable for their unlawful market division and price-fixing activities *in this country*.

At the same time, recognizing plaintiffs' claims does not threaten expansive displacement of the authority of other nations. It is not easy to cartelize a global market, because the cartel will unravel as a result of arbitrage unless every producer in the world participates. Only in cases involving commodities like bulk vitamins – fungible in nature but difficult to make, with high entry barriers to the market, and easily and cheaply transportable internationally – is cartelization even a possibility, and even then cartels are fragile. Coordination of activity internationally is difficult and requires participants to go to great lengths to maintain secrecy.

Moreover, in contrast to claims alleging, for instance, monopolization, there is no risk that U.S. law would punish conduct that other nations would permit. Defendants' conduct is unlawful "in every industrialized country and many others." Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What, and How?*, 60 ANTITRUST L.J. 593, 597 (1992). For example, the recommendations of the United Nations Conference on Trade and Devel-

opment "include a provision condemning cartels," and the OECD has similarly issued a similar condemnation of hard-core cartels. Int'l Competition Pol'y Adv. Comm., Final Report to the A.G. and Ass't A.G. for Antitrust 185 (2000). "When there is the most blatant form of conspiracy in restraint of trade, a horizontal price-fixing agreement between competitors, the antitrust regimes of the world are united in the view that it does not matter that the smoke-filled rooms where the plots are hatched are abroad." Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27, 28 (1999).

That multiple nations may have overlapping jurisdiction over defendants' cartel creates no conflict and raises no comity concerns. "Exercise of jurisdiction by more than one state may be reasonable – for example, * * * when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory * * *." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. D (2002). Only direct *conflicts* between the substantive requirements of two states' laws would require this Court to limit the prescriptive jurisdiction of one of the states – that is, "only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible." *Id.* § 403 cmt. e.[7]

3. This Court's previous decision also relied on the fact that there was "no significant indication that at the time Congress wrote this statute courts would have thought the

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[7] See also RESTATEMENT § 415(2) ("Any agreement in restraint of United States trade that is made outside the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.").

Sherman Act applicable" when plaintiffs' injuries were independent of the defendants' conduct in this country. Pet. App. 39a-40a. The claims now before the Court, by contrast, involve the injuries caused by a cartel that radiated damage outward from the United States. Such cartels were a central concern of Congress in enacting the antitrust laws. "[O]ne of the express goals when the Sherman Act was passed in 1890 was to combat the trusts and cartels which, as Senator Sherman put it, were 'imported from abroad.'" James A. Rahl, *Foreign Trade Antitrust Improvements Act, Hrgs. Before the Subcomm. on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Reps.*, 97th Cong., 1st Sess. 42 (1981) (*House Hearings*). The "effects" test first articulated in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 444 (CA2 1945), was "pioneered" for cartel cases. See Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 916 (2003) (describing off-shore cartels as the "paradigmatic[]" case for the application of the effects doctrine).

That purpose was notably preserved in the FTAIA, which was not intended to limit claims against global cartels. As the Report on the FTAIA explained in language that this Court specifically invoked in its previous decision in this case: "Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction." H.R. Rep. 97-686 at 13. The Report furthermore explains that the statute was intended "as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards" (H.R. REP. 97-686 at 2) – standards which expressly provided that Sherman Act jurisdiction extends to cartels without regard to where particular activities in furtherance of the cartel occurred. See U.S. D.O.J., *Antitrust Guide for International Operations*, Case L, "Dealing With A Cartel" (Jan. 26, 1977). Commentators thus uniformly recognize that, "*[o]f course*, [the FTAIA] was *not* intended to cover the situation of a foreign cartel targeting United States mar-

kets." 1A Areeda et al., *supra*, ¶ 272i n.69 (emphases added); see also Barry E. Hawk, *International Antitrust Policy and the 1982 Acts*, 51 FORDHAM L. REV. 201, 220 (1982) ("The Sherman Act's application to United States and foreign participation in international cartels remains unchanged, as the House Report expressly recognizes."); 1 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST 177-78 (Supp. 1996-1); *id.* at 292 n.79.

Because the decision below resolves an important decision in a manner that cannot be reconciled with this Court's precedents, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 26, 2005

APPENDIX

EMPAGRAN S.A. ET AL., APPELLANTS

v.

F. HOFFMANN-LAROCHE, LTD. ET AL., APPELLEES

No. 01-7115

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April 20, 2005, Argued
June 28, 2005, Decided

COUNSEL: Thomas C. Goldstein argued the cause for the appellants. Amy Howe, Michael D. Hausfeld, Paul T. Gallagher and Brian A. Ratner were on brief.

Stephen M. Shapiro argued the cause for the appellees. Bruce L. Montgomery, Arthur F. Golden, Stephen Fishbein, John M. Majoras, Daniel H. Bromberg, Lawrence Byrne, D. Stuart Meiklejohn, Stacey R. Friedman, Tyrone C. Fahner, Stephen M. Shapiro, Andrew S. Marovitz, Jeffrey W. Sarles, Michael L. Denger, Miguel A. Estrada, Laurence T. Sorkin, Roy L. Regozin, Paul P. Eyre, Ernest E. Vargo, Donald I. Baker, W. Todd Miller, Alice G. Glass, Peter E. Halle, Kevin R. Sullivan, Peter M. Todaro, Jeffrey S. Cashdan, Thomas M. Mueller, Michael O. Ware, James R. Weiss, Aileen Meyer, Sutton Keany, Bryan Dunlap, Martin Frederic Evans, Gary W. Kubek, Karen N. Walker, Moses Silverman and Mark Riera were on brief.

Steven J. Mintz, Attorney, United States Department of Justice, argued the cause for amici curiae United States of America and Federal Trade Commission in support of the appellees. Robert H. Pate, III, Assistant Attorney General,

Robert B. Nicholson, Attorney, United States Department of Justice, and John D. Graubert, Acting General Counsel, Federal Trade Commission, were on brief. Adam D. Hirsh, Attorney, United States Department of Justice, entered an appearance.

Homer E. Moyer, Jr. and Alan I. Horowitz were on brief for amicus curiae Government of Canada in support of the appellees.

Ernest Gellhorn was on brief for amici curiae Federal Republic of Germany et al. in support of the appellees.

Mark S. Popofsky, Michael D. Blechman, Saul P. Morgenstern and Peter A. Barile, III were on brief for amicus curiae United States Council for International Business in support of the appellee.

OPINION

KAREN LECRAFT HENDERSON, Circuit Judge: The appellants, foreign corporations that purchased vitamin products outside of the United States for distribution in foreign countries from the appellee foreign manufacturers, brought this action asserting, *inter alia*, price fixing in violation of the Sherman Act, 15 U.S.C. § 1.[1] The district court dismissed the Sherman Act claim for lack of subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act (FTAIA), which makes the Sherman Act inapplicable to conduct involving non-import foreign trade or commerce with one exception: when "such conduct has a direct, substantial, and reasonably foreseeable effect" on *domestic* trade or commerce and "such effect gives rise to a

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[1] This section provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

claim under [the Sherman Act]."[2] *Empagran S.A.* v. *F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at 2 (2001). This court in a divided opinion reversed the district court, reasoning that "where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." *Empagran S.A.* v. *F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003). The United States Supreme Court granted *certiorari* and vacated this court's decision concluding that under the FTAIA the Sherman Act does not apply where "price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect." *F. Hoffmann-La Roche, Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004). The Supreme Court remanded to this court, however, to assess the appellants'

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[2] The FTAIA provides in full:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless–

(1) such conduct has a direct, substantial, and reasonably foreseeable effect–

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.

If *sections 1 to 7* of this title apply to such conduct only because of the operation of paragraph (1)(B), then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.

alternate theory for Sherman Act liability, namely, that "because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." 124 S. Ct. at 2372.[3] We reject the appellants' alternate theory and conclude that we are without subject-matter jurisdiction under the FTAIA.[4]

While the FTAIA excludes from the Sherman Act's reach most anti-competitive conduct that causes only foreign injury, it creates exceptions for conduct that "significantly harms imports, domestic commerce, or American exporters." *Empagran*, 124 S. Ct. at 2363. At issue is the "domestic-injury exception" of section 6a(2), which we conclude, as counsel for the United States argued, applies in only limited circumstances.

The appellees suggest that the exception applies only to injuries that arise in U.S. commerce, thus describing its reach by the situs of the transaction and resulting injuries rather than by the situs of the effects of the allegedly anti-competitive conduct giving rise to the appellants' claims. This interpretation has no support from the text of the statute, which expressly covers conduct involving "trade or commerce with foreign nations." 15 U.S.C. § 6a(1)(A). In addition, the legislative history makes clear that the FTAIA's "domestic effects" requirement "does not exclude all persons injured abroad from recovering under the antitrust laws of the United States." H.R. Rep. No. 97-686, at 17a. The appellants

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[3] The Supreme Court also directed us as a threshold matter to determine whether the appellants preserved their alternative theory for appeal. 124 S. Ct. at 2372. In a decision issued November 2, 2004, we concluded that they have. *See S.A. v. F. Hoffman-La Roche, Ltd.*, 388 F.3d 337, 340-44 (D.C. Cir. 2004).

[4] In light of our decision on FTAIA subject matter jurisdiction, we need not consider the appellees' alternative argument that the appellants lack standing.

need only demonstrate therefore that the U.S. effects of the appellees' allegedly anti-competitive conduct "gave rise to" their claims.

During oral argument, counsel for the United States identified three decisions with factual scenarios that, in its view, satisfy the narrow "domestic-injury exception": *Pfizer, Inc.* v. *Gov't of India*, 434 U.S. 308 (1978); *Industria Siciliana Asfalti, Bitumi, S.p.A.* v. *Exxon Research & Eng'g Co.*, 1977 WL 1353 (S.D.N.Y. 1977); and *Caribbean Broad. Sys.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998). Counsel nonetheless argued, and we agree, that each of these cases is distinguishable. For example, in *Pfizer*, which involved a conspiracy that operated both domestically and internationally, the Supreme Court held "only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff," 434 U.S. at 320, without addressing the requisite causal relationship between domestic effect and foreign injury. In *Industria*, the foreign injury was "inextricably bound up with the domestic restraints of trade," 1977 WL 1353, at *11, because a reciprocal tying agreement effected the exclusion of the American rival of one defendant, resulting in higher consumer prices. Finally, in *Caribbean* this court expressly found the FTAIA permitted a Sherman Act claim that involved solely foreign injury. There the plaintiff broadcaster, Caribbean, which operated an FM radio station based in the British Virgin Islands, filed an antitrust action against a competing FM radio station and its joint venturer, alleging that the defendants had violated the Sherman Act by preserving the defendant station's radio broadcast monopoly in the eastern Caribbean region through, *inter alia*, misrepresentations to its advertisers regarding the station's broadcasting reach. While the court expressly addressed only how Caribbean's allegations satisfied subsection 1 of the FTAIA (finding the requisite effect of the defendants' conduct on domestic trade or commerce), it is clear from the court's opinion that Caribbean's allegations satisfied

subsection 2 as well. The domestic effect the court found was that U.S. advertisers paid the defendant station excessive prices for advertising. It was this effect of the defendants' monopolizing conduct – forcing U.S. businesses to pay for advertising on the defendant station – that caused Caribbean to lose revenue because it was unable to sell advertising to the same U.S. businesses. See 148 F.3d at 1087.

The appellants' theory in a nutshell is as follows:

> Because the appellees' product (vitamins) was fungible and globally marketed, they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well.[5] Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the appellees from selling abroad at the inflated prices. Thus, the super-competitive pricing in the United States "gives rise to" the foreign super-competitive prices from which the appellants claim injury.

See Appellants' Br. at 15-21. The appellants paint a plausible scenario under which maintaining super-competitive prices in the United States might well have been a "but-for" cause of the appellants' foreign injury. As the appellants acknowledged at oral argument, however, "but-for" causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anti-competitive conduct within the FTAIA exception. The statutory language – "gives rise to"

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[5] The appellants assert the appellees accomplished this equipoise both by fixing a single global price for the vitamins and by creating barriers to international vitamin commerce in the form of market division agreements that prevented bulk vitamins from being traded between North America and other regions.

– indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for "nexus" the appellants advanced in their brief. *See* Appellants Br. at 22-23. This interpretation of the statutory language accords with principles of "prescriptive comity" – "the respect sovereign nations afford each other by limiting the reach of their laws," *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) – which require that we "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche, Ltd.*, 124 S. Ct. at 2366. To read the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders. *See id.* at 2367 ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in [in] significant part by Canadian or British or Japanese or other foreign companies?").

Applying the proximate cause standard, we conclude the domestic effects the appellants cite did not give rise to their claimed injuries so as to bring their Sherman Act claim within the FTAIA exception. While maintaining super-competitive prices in the United States may have facilitated the appellees' scheme to charge comparable prices abroad, this fact demonstrates at most but-for causation. It does not establish, as in the cases the United States cites, that the U.S. effects of the appellees' conduct – i.e., increased prices in the United States – proximately caused the foreign appellants' injuries. Nor do the appellants otherwise identify the kind of direct tie to U.S. commerce found in the cited cases. Although the appellants argue that the vitamin market is a single, global market facilitated by market division agreements so that their injuries arose from the higher prices charged by the global

conspiracy (rather than from super-competitive prices in one particular market), they still must satisfy the FTAIA's requirement that the U.S. effects of the conduct give rise to their claims. The but-for causation the appellants proffer establishes only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad. *Cf. Sniado* v. *Bank Austria AG*, 378 F.3d 210, 213 (2d. Cir. 2004). Under the appellants' theory, it was the foreign effects of price-fixing outside of the United States that directly caused, or "gave rise to," their losses when they purchased vitamins abroad at super-competitive prices. That the appellees knew or could foresee the effect of their allegedly anti-competitive activities in the United States on the appellants' injuries abroad or had as a purpose to manipulate United States trade does not establish that "U.S. effects" proximately caused the appellants' harm. The foreign injury caused by the appellees' conduct, then, was not "inextricably bound up with . . . domestic restraints of trade," as in *Industria* and *Caribbean Broadcasting*. *See Empagran*, 124 S. Ct. at 2370. It was the foreign effects of price-fixing outside of the United States that directly caused or "gave rise to" the appellants' losses when they purchased vitamins abroad at super-competitive prices.

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

EMPAGRAN S.A., ET AL., APPELLANTS

v.

F. HOFFMAN-LAROCHE, LTD., ET AL., APPELLEES

No. 01-7115

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

November 2, 2004, Argued
November 2, 2004, Decided

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For DAIICHI PHARMA HOLDINGS, INC., Defendant - Appellee: Michael L. Denger, Gibson, Dunn & Crutcher, Washington, DC.

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JUDGES: Before: EDWARDS, HENDERSON, and ROGERS, Circuit Judges.

OPINION

Per Curiam: In *F. Hoffman-LaRoche, Ltd.* v. *Empagran S.A.*, 542 U.S. 155 ("*Empagran III*"), the Supreme Court vacated this court's judgment in *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003) ("*Empagran II*"), regarding the reach of the domestic-injury exception to the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a. We now face an issue that was left unresolved in *Empagran II* and in the Supreme Court's review of that decision.

Section 1 of the Sherman Act makes unlawful "every contract, combination or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 4 of the Clayton Act confers a cause of action on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for treble damages. *Id.* § 15(a). Section 16 of the Clayton Act entitles "any person, firm, corporation, or association to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws." *Id.* § 26. In 1982, Congress enacted the FTAIA, which amended the Sherman Act to make the Sherman Act inapplicable to non-import foreign commerce unless the "conduct has a direct, substantial, and reasonably foreseeable effect" on domestic commerce, and "such effect gives rise to a claim under" the Sherman Act. *Id.* § 6a. In vacating the judgment of this court in *Empagran II*, the Supreme Court

held that the FTAIA does not reach claims arising out of foreign injury that is entirely independent of the domestic effects of the allegedly anticompetitive conduct. The Court noted, however, that appellants had raised an "alternative" claim: the alleged anticompetitive conduct's domestic effects were linked to the asserted foreign harm, and without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and appellants would not have suffered their foreign injury. The Court expressly declined to decide whether this "but for" condition is sufficient to bring the contested price-fixing conduct within the scope of the FTAIA's exception. The case was remanded to this court for further proceedings on this issue.

Following remand from the Supreme Court, an order was issued by this court instructing the parties to submit briefs on three questions: (i) whether the alternative claim – which appellants argued to the Supreme Court – was properly pleaded; (ii) whether it was preserved before this court; and (iii) if this alternative claim was properly pleaded and preserved, whether it should be resolved in the first instance by the District Court. *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 2004 U.S. App. LEXIS 13431, No. 01-7115, Order (D.C. Cir. June 21, 2004) ("Briefing Order"). Having reviewed the parties' briefs, the record of proceedings in this case, the District Court's decision in *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360 (D.D.C. 2001) ("*Empagran I*"), and the decisions in *Empagran II* and *Empagran III*, it is clear that appellants raised their so-called "alternative" claim before the District Court and before this court. It is also clear that appellees have never suggested at any point in this protracted litigation, at least, not before now, that appellants' alternative claim was either insufficiently pleaded or waived. Accordingly, we hold that the alternative claim was both pleaded and preserved.

The parties are in accord that this court, not the District Court, should rule in the first instance on the sufficiency of

the alleged nexus between the purported foreign injuries and the domestic effects. We agree. This recommended course will preserve judicial resources and remain faithful to the integrity of the appellate process, because the issue can be resolved as a pure question of law. We will therefore order full merits briefing and schedule oral argument on whether the nature of the alleged link between foreign injury and domestic effects is legally sufficient to trigger application of the FTAIA's domestic-injury exception, and decide the question in the first instance.

Finally, appellants filed a motion in this court for a limited remand that would permit the District Court to conduct proceedings on issues relating to a $ 10 million settlement that plaintiffs reached with a subset of the defendants. *See* Pls.-Appellants' Mot. for Limited Remand (Aug. 19, 2004), at 1. The settlement was reached in December 2003, after this court filed its decision in *Empagran II* and before the Supreme Court granted *certiorari*. *See id.* at 3. Appellants submit that the settlement should be approved by the District Court prior to and irrespective of whether the court is ultimately found to have subject matter jurisdiction. *See id.* at 4-6. We disagree. It would defy the basic tenets of federal jurisdiction for this court to remand the case to the District Court to oversee settlement proceedings before it has been determined whether the District Court has subject matter jurisdiction.

An order will be issued in due course establishing a briefing schedule and setting the case for oral argument.

I. BACKGROUND

Appellants initially filed a class action lawsuit on behalf of foreign and domestic purchasers of vitamins alleging that appellees, foreign and domestic vitamin manufacturers and distributors, had engaged in anticompetitive activity that injured customers in the United States and abroad. Appellees moved to dismiss the suit as to foreign purchasers who bought vitamins from appellees outside the United States. The

District Court granted appellees' motion to dismiss. *See Empagran I*, 2001 WL 761360. This court reversed. *See Empagran II*, 315 F.3d 338. The Supreme Court granted *certiorari* on the question whether foreign purchasers could bring a suit in U.S. courts when anticompetitive conduct with foreign effects, which are entirely independent of any domestic effects, gave rise to their claim. *See Empagran III*, 124 S. Ct. 2359. The Supreme Court vacated this court's judgment and remanded the case to this court for further proceedings. *See id.* at 2372-73.

The Supreme Court held that the domestic-injury exception to the FTAIA does not reach claims arising out of a foreign injury that is entirely independent of the domestic effects of the challenged conduct. *See id.* at 2372 ("We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury."). The Court acknowledged that respondents-appellants also had raised an "alternative" claim:

> Respondents argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct's domestic effects were linked to that foreign harm. Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury. They add that this "but for" condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception.

Id. at 2372. The Supreme Court left open the question whether this alternative claim was properly pleaded and preserved below. *See id.*

This court subsequently ordered the parties to brief the questions presented above. *See* Briefing Order of June 21, 2004.

II. ANALYSIS

A. *Whether the Alternative Claim was Properly Pleaded*

Appellants submit that their complaint complied with the notice pleading requirement of the Federal Rules. Specifically, appellants argue that their complaint provided fair notice of their legal theory that the domestic effects of the allegedly anticompetitive conduct were necessary to induce the foreign injury because the complaint alleged (i) a "global market" for bulk vitamins; (ii) a small number of vitamins producers and significant barriers to entry; (iii) horizontal agreements in which North American and European manufacturers and distributors (defendants) agreed to leave each other's markets; and (iv) elimination of arbitrage as a key part of the conspiracy. *See* Appellants' Br. 2-3.

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint include a "short and plain statement" of the grounds for jurisdiction and of the claims alleged. *See* FED. R. CIV. P. 8(a). Appellants note that Rule 8(a) provides the only pleading requirement for their complaint, *see* Appellants' Br. 3 (citing, *e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 513 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions.")), and stress that "conclusory" allegations meet the requirement of this rule. *See id.* at 3-4 (citing, *e.g.*, *Warren* v. *District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004)).

Appellants also argue that legal theories need not be pleaded. *See* Appellants' Br. 4. They rely on *Hanson* v. *Hoffman*, 628 F.2d 42, 53 (D.C. Cir. 1980), which stressed that "the liberal concepts of notice pleading embodied in the Federal Rules do not require the pleading of legal theories." In *Hanson*, this court read an implicit First Amendment claim into the plaintiff's complaint, which alleged sex

discrimination but included the "basic factual allegation" for a First Amendment claim. *See id. Hanson* noted that "unless a defendant is prejudiced on the merits by a change in legal theory, a plaintiff is not bound by the legal theory on which he or she originally relied." *See id.* at 53 n.11 (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1219 (1969)).

Appellees counter that appellants' complaint failed to plead a nexus between their purported foreign injury and the domestic effects of the allegedly anticompetitive activity. *See* Appellees' Br. 4. Appellees argue that what appellants' complaint had actually alleged was foreign injury from a worldwide conspiracy, which also harmed U.S. commerce. *See id.* For this reason, appellees argue, the complaint failed to provide adequate notice of appellants' alternative claim. *See id.*

Appellees do not respond to any of the complaint's specific allegations that appellants discuss in their brief, but rather dismiss appellants' argument as "*post hoc* wordplay." *Id.* Appellees also do not point to any part of appellants' complaint to support their characterization of what was actually pleaded. Instead, they purport to rely on the District Court's decision, which stated that "plaintiffs have not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case. Plaintiffs argue that the jurisdictional nexus is provided solely by the global nature of the defendants' conduct." *Empagran I*, 2001 WL 761360, at *3, quoted at Appellees' Br. 4. Appellees also point to their motion to dismiss, which stated that plaintiffs failed to allege that the foreign injuries "arose" from domestic effects, and plaintiffs' response in opposition to the motion to dismiss, which claimed that the "proper focus" for the jurisdictional question is not whether plaintiffs' transactions had effects on domestic commerce, but whether defendants' conduct had such effects. *See* Appellees' Br. 4-5 (discussing Defs.' Mot. to Dismiss (Mar. 6, 2001), *reprinted at* Appellees' App. at 18-

21; Pls.' Opp'n to Mot. to Dismiss (Apr. 6, 2001), *reprinted at* Appellees' App. at 27).

None of these statements on which appellees rely is inconsistent with appellants' position, however. First, appellants specifically argued before this court that the District Court erred in finding that they had not established jurisdiction, even under the District Court's more narrow conception of the requisite allegations. The District Court's description of appellants' position, moreover, is consistent with appellants' alternative claim: plaintiffs did not suggest that their foreign injuries had effects on domestic commerce, but rather that the allegedly anticompetitive activity, which created appellants' foreign injuries, could not have succeeded (and therefore injured them) without supracompetitive prices in the United States, *i.e.*, without domestic effects. According to appellants' alternative claim, the "global nature of the defendants' conduct" accounts for the interconnectedness of the domestic effects and the foreign effects, which gave rise to appellants' injury.

Appellees' motion to dismiss seems to misconstrue the alternative claim, which states, not that anticompetitive effects on U.S. commerce were the independent cause of appellants' foreign injury, but rather that these effects comprised a necessary link in creating the foreign injury. Thus, appellants' alternative claim is consistent with the argument in their opposition to the motion to dismiss that the focus should not be on whether plaintiffs' transactions affected domestic commerce. The appropriate question under appellants' alternative claim would be whether appellees' anticompetitive conduct had effects in the United States that were necessary to achieve appellants' injury abroad.

Appellants contend, moreover, that because appellees never before asserted that appellants failed to satisfy Federal Rules of Civil Procedure Rule 8, in spite of the fact that appellants argued their alternative claim before the District Court, this court, and the Supreme Court, appellees have

waived this argument. *See* Appellants' Br. 4-7. Appellants point to *Lennon* v. *U.S. Theatre Corp.*, 920 F.2d 996, 1000 (D.C. Cir. 1990), which noted that a party's failure to challenge the absence of a necessary pleading under Federal Rules of Civil Procedure Rule 8 "in all likelihood waives any waiver defense that [the party's] omission might otherwise have created." More importantly, appellants submit that because they raised the alternative claim at every stage in the litigation, appellees' silence on this point demonstrates that appellees understood the complaint to allege the alternative claim. *See* Appellants' Br. 4, 6-7.

Appellants rely on *Arent* v. *Shalala*, 70 F.3d 610, 618 (D.C. Cir. 1995), which held that "lack of specificity is not fatal [to a complaint] so long as the defendant is given 'fair notice' of the plaintiff's claim." In *Arent*, appellants challenged final regulations on nutritional labeling promulgated by the Food and Drug Administration. This court found that although appellants' amended complaint was ambiguous and the record was unclear as to which of two possible claims appellants intended to include, the amended complaint was sufficient because the Food and Drug Administration "had fair notice of the interpretation of appellants' amended complaint for which appellants argued on appeal." *Id.* at 619, quoted at Appellants' Br. 7. Appellants submit that this is an easier case than *Arent*, because even if this court concludes that the complaint is ambiguous, the record is clear: appellants intended the complaint to allege their alternative claim, and argued the alternative claim before the District Court, this court, and the Supreme Court. At the status conference before the District Court, for example, appellants argued at length that a global market for bulk vitamins existed and that control of the U.S. market was necessary for the conspiracy to succeed. *See* Tr. of Status Conference (May 23, 2001), *reprinted at* Appellants' App. at 67-71. Thus, appellants submit that appellees received ample notice of the alternative claim, but nevertheless failed to contest whether it was properly pleaded. Appellees' brief is

silent on appellants' reliance on *Arent*; appellees assert only that they did not waive any arguments at the status conference because they were pressed for time. *See* Appellees' Br. 5 n.4.

Appellants are correct that appellees' failure to challenge the complaint under Rule 8, even after the alternative claim was repeatedly argued by appellants, establishes that the complaint sufficiently placed appellees on notice regarding the alternative claim and therefore complied with the Federal Rules. Appellees failed to challenge the alternative claim under Rule 8, not only during the status conference, but also at any subsequent point before the District Court or before this court. Appellees' silence on this point suggests that the complaint adequately placed them on notice regarding the alternative claim.

B. *Whether the Alternative Claim was Preserved*

Appellants argue that they have preserved their alternative claim by advancing it in briefs or oral arguments at every stage in this litigation. *See* Appellants' Br. 4. Appellees counter that appellants waived their alternative claim because they failed to "raise it clearly in the district court." Appellees' Br. 5. But appellees do not explain what exactly was unclear about the way that appellants raised it. In contrast, appellants discussed their argument before the District Court at length. At the status conference, appellants' counsel explained how the global market for bulk vitamins functioned, including that control of the U.S. market was necessary because otherwise arbitrage would destroy supracompetitive pricing. Appellants' counsel stressed that

> if you affected the prices in the United States, you affected the prices around the world, regardless of where you were. That is [] where the interconnection in this market comes in. It's not just foreign commerce. It's not just United States commerce. It is commerce literally that was held in balance as world commerce by the defendants, and

> adjustments were made, set and fixed with regard to the world market conditions.

Tr. of Status Conference (May 23, 2001), *reprinted at* Appellants' App. at 71, *quoted at* Appellants' Br. 5. Appellants argue that this discussion before the District Court preserved the issue for appeal. *See* Appellants' Br. 5 n.1.

Appellants point to *Fraternal Order of Police* v. *United States*, 173 F.3d 898, 902 (D.C. Cir. 1999), which held that presenting a claim in oral argument before the district court "was enough to satisfy the general requirement that an issue on appeal be raised in the trial court." *Fraternal Order of Police* also stressed that "the District Court for the District of Columbia regularly considers arguments raised for the first time at oral argument in deciding dispositive motions." *Id.* Appellees counter that *Fraternal Order of Police* is not on point because appellants did not rely on the alternative claim but rather argued before the District Court that they did not need to establish a nexus between the domestic effects and the foreign injury. *See* Appellees' Br. 5-6. Appellees' attempt to distinguish *Fraternal Order of Police* is unavailing: appellees seem to misconstrue the meaning of an "alternative" claim, which is *alternative* because appellants rely on a different, primary theory.

Appellants also point to their discussion of the alternative claim in their briefs before this court in *Empagran II*, and underscore that the court itself recognized that appellants had raised the alternative claim. *See* Appellants' Br. 6. Indeed, this court stated in *Empagran II*:

> In the alternative, appellants claim that their complaint states a viable cause of action even under the District Court's *restrictive view* of FTAIA. Appellants contend that appellees caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by

> the worldwide conspiracy, appellants say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to appellants, the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, appellants claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad.

315 F.3d at 341. Appellants establish that they also preserved the alternative claim before the Supreme Court, by addressing it in their briefs and at oral argument. *See* Appellants' Br. 6.

Appellants argue, moreover, that because appellees never suggested to the District Court or to this court that the alternative claim was waived, they have waived their chance to make such an argument. *See id.* at 6. Appellants are correct; the alternative claim was preserved, because appellants have demonstrated that they consistently raised the claim and appellees do not purport to have argued to this court or the court below that the claim was waived. *See, e.g.*, *United States* v. *Layeni*, 90 F.3d 514, 522 (D.C. Cir. 1996) ("The government, however, has waived the waiver argument by not raising it.").

C. Whether this Court Should Remand the Case to the District Court

The parties (as well as the amici curiae) are in agreement that this court should not remand the case to the District Court before it determines whether the nature of the link alleged by appellants is legally sufficient to trigger application of the FTAIA's domestic-injury exception. Appellants, appellees, and their amici curiae all argue that this is a question of law best resolved by this court in the first instance.

Appellants argue against remand absent further guidance from this court because they read the Supreme Court's

decision as contemplating this court's resolution of the legal sufficiency of the complaint. *See* Appellants' Br. 10-11. They argue that this is a question of law and that their proposed course best preserves judicial resources. They also submit that remanding to the District Court without further instruction would leave the trial court "somewhat at sea." *Id.* at 11.

Appellees agree that the sufficiency of any alleged jurisdictional link between domestic effects and foreign injury is a question that "can be answered as a matter of law." Appellees' Br. 6. Appellees point to *Sniado* v. *Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004) (per curiam), in which the Second Circuit vacated, in light of *Empagran III*, a prior ruling on remand from the Supreme Court. The court of appeals also decided the question whether the plaintiff's complaint could have alleged the "alternative" theory noted in *Empagran II*, despite the fact that the plaintiff had not previously raised the argument to the district court or to the court of appeals, because the Second Circuit concluded that the plaintiff's "alternative theory is purely legal and requires no further development of the record." *See id.* at 213.

The United States and the Federal Trade Commission ("FTC"), amici curiae in support of appellees, also argue against a remand to the District Court in this case because "the issue is purely legal." U.S. & FTC Amicus Curiae Br. 1. Amici curiae contend that this court's resolution of the question not only would preserve judicial resources but also would prevent harm to the United States in deterring antitrust violations by removing a disincentive to seek amnesty. *See id.* at 1-2.

No party or amici has presented any argument for remanding this case to the District Court. The parties are correct that the Supreme Court seems to have suggested that it would be appropriate for this court to decide the question: "Respondents remain free to ask the Court of Appeals to consider the [alternative] claim. The Court of Appeals may determine whether respondents properly preserved the

argument, and, if so, it may consider it and decide the related claim." *Empagran III*, 124 S. Ct. at 2372. The parties are also correct that the question whether appellants' alternative claim provides a sufficient nexus can be decided as a pure question of law. It should be noted, however, that one circuit has remanded a similar case, in light of *Empagran III*, instructing the district court, "should it deem it necessary or helpful, [to] give the parties the opportunity to present evidence as to whether the alleged anticompetitive conduct's domestic effects were linked to the alleged foreign harm." *BHP New Zealand Ltd.* v. *UCAR Int'l, Inc.*, 106 Fed. Appx. 138, 2004 WL 1771436, at *2 (3d Cir. 2004), noted at Appellees' Br. 6 n.5.

On balance, we agree with the parties that reaching the legal question at this point would not stymie the development of an appropriate record: If the legal argument for the jurisdictional nexus is sufficient to survive a motion to dismiss, the parties will each have an opportunity to develop their case before the trial court. If the legal argument is without merit, then judicial economy supports a ruling by this court in the first instance. Appellees' arguments on the merits are not properly before the court at this juncture, so we will not consider them. These arguments, and the arguments in support of appellants' alternative claim, will be subject to full briefing and oral argument before the court reaches judgment on the alternative claim.

D. *Motion for Limited Remand*

There is one last matter pending before the court that warrants our attention at this juncture. On August 19, 2004, appellants filed a motion in this court for a limited remand that would permit the District Court to conduct proceedings on issues relating to a $ 10 million settlement that plaintiffs reached with a subset of the defendants. *See* Pls.-Appellants' Mot. for Limited Remand (Aug. 19, 2004), at 1. The settlement was reached in December 2003, after the court of appeals filed its decision and before the Supreme Court

granted *certiorari*. *See id.* at 3. Appellants submit that the settlement should be approved by the District Court prior to and irrespective of whether the court is ultimately found to have subject matter jurisdiction. *See id.* at 4-6. Appellants contend that permitting this limited remand advances the parties' and potential class members' right to finality. *See id.* at 4-5.

On September 3, 2004, appellees filed an opposition to appellants' motion. *See* Defs.-Appellees' Resp. in Opp'n of Mot. for Limited Remand. Appellees argued that it would be inappropriate for the District Court to oversee a settlement before the question whether the District Court has subject matter jurisdiction over this case is resolved. *See id.* at 3-7. Appellees submit that the limited remand is a poor use of scarce judicial resources. *See id.* at 4-5. Appellees also stress that the limited remand is counter to their interests, because it would force them to expend time and resources in settlement-related proceedings on a claim that may have no jurisdictional basis in U.S. courts. *See id.* at 5.

Appellees are correct that it would be improper for this court to remand the case to the District Court to oversee settlement proceedings prior to any determination whether the District Court actually has subject matter jurisdiction. Appellants' proposal to permit a limited remand for settlement proceedings before it is determined whether the District Court has subject matter jurisdiction is in tension with the basic tenets of federal jurisdiction. *See Tuck* v. *Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("Jurisdiction is, of necessity, the first issue for an Article III court. The federal courts are courts of limited jurisdiction, and they lack the power to presume the existence of jurisdiction in order to dispose of a case on any other grounds.").

III. CONCLUSION

In due course, the court will issue an order instructing the parties to submit full merits briefs on the question whether the nature of the alleged link between foreign injury and domestic

effects is legally sufficient to trigger application of the FTAIA's domestic-injury exception. The order will also set a date for oral arguments in this case.

F. HOFFMANN-La ROCHE LTD, et al., Petitioners

v.

EMPAGRAN S. A. et al.

No. 03-724

SUPREME COURT OF THE UNITED STATES

April 26, 2004, Argued
June 14, 2004, Decided

COUNSEL:

Stephen M. Shapiro argued the cause for petitioners.

R. Hewitt Pate argued the cause for the United States, as *amicus curiae*, by special leave of court.

Thomas C. Goldstein argued the cause for respondents.

JUDGES: Breyer, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, Kennedy, Souter, and Ginsburg, JJ., joined. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. O'Connor, J., took no part in the consideration or decision of the case.

OPINION

Justice Breyer delivered the opinion of the Court.

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." 96 Stat 1246, 15 U.S.C. § 6a. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.

We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury. We ask two questions about the price-fixing conduct and the foreign injury that it causes. First, does that conduct fall within the FTAIA's general rule excluding the Sherman Act's application? That is to say, does the price-fixing activity constitute "conduct involving trade or commerce . . . with foreign nations"? We conclude that it does.

Second, we ask whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) "such effect gives rise to a [Sherman Act] claim." §§ 6a(1)(A), (2). We conclude that the exception does not apply where the plaintiff's claim rests solely on the independent foreign harm.

To clarify: The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim. In more concrete terms, this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. We conclude that, in this scenario, a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.

I

The plaintiffs in this case originally filed a class-action suit on behalf of foreign and domestic purchasers of vitamins under, *inter alia*, § 1 of the Sherman Act, 26 Stat 209, as amended, 15 U.S.C. § 1, and §§ 4 and 16 of the Clayton Act, 38 Stat 731, 737, as amended, 15 U.S.C. §§ 15, 26. Their

complaint alleged that petitioners, foreign and domestic vitamin manufacturers and distributors, had engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries.

As relevant here, petitioners moved to dismiss the suit as to the *foreign* purchasers (the respondents here), five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins from petitioners for delivery outside the United States. 2001 WL 761360, *4 (D. D. C., June 7, 2001) (describing the relevant transactions as "wholly foreign"). Respondents have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce, and the question presented assumes that the relevant "transactions occurr[ed] entirely outside U. S. commerce." The District Court dismissed their claims. *Ibid.* It applied the FTAIA and found none of the exceptions applicable. *Id.* Thereafter, the *domestic* purchasers transferred their claims to another pending suit and did not take part in the subsequent appeal. 315 F.3d 338, 343 (CADC 2003).

A divided panel of the Court of Appeals reversed. 315 F.3d 338. The panel concluded that the FTAIA's general exclusionary rule applied to the case, but that its domestic-injury exception also applied. It basically read the plaintiffs' complaint to allege that the vitamin manufacturers' price-fixing conspiracy (1) had "a direct, substantial, and reasonably foreseeable effect" on ordinary domestic trade or commerce, *i.e.*, the conspiracy brought about higher domestic vitamin prices, and (2) "such effect" gave "rise to a [Sherman Act] claim," *i.e.*, an injured *domestic* customer could have brought a Sherman Act suit, 15 USC §§ 6a(1), (2). Those allegations, the court held, are sufficient to meet the exception's requirements. 315 F.3d at 341.

The court assumed that the foreign effect, *i.e.*, higher prices in Ukraine, Panama, Australia, and Ecuador, was

independent of the domestic effect, *i.e.*, higher domestic prices. *Ibid.* But it concluded that, in light of the FTAIA's text, legislative history, and the policy goal of deterring harmful price-fixing activity, this lack of connection does not matter. *Ibid.* The District of Columbia Circuit denied rehearing *en banc* by a 4-to-3 vote. App. to Pet. for Cert. 44a.

We granted certiorari to resolve a split among the Courts of Appeals about the exception's application. Compare *Den Norske Stats Oljeselskap As* v. *HeereMac Vof*, 241 F.3d 420, 427 (CA5 2001) (exception does not apply where foreign injury independent of domestic harm), with *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384, 400 (CA2 2002) (exception does apply even where foreign injury independent); 315 F.3d at 341 (similar).

II

The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. See H. R. Rep. No. 97-686, pp 1-3, 9-10 (1982) (hereinafter House Report). It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.

The FTAIA says:

> "Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless–
>
> "(1) such conduct has a direct, substantial, and reasonably foreseeable effect–
>
> "(A) on trade or commerce which is not trade or commerce with foreign nations [*i.e.*,

> domestic trade or commerce], or on import trade or import commerce with foreign nations; or
>
> "(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [*i.e.*, on an American export competitor]; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> "If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States." 15 U.S.C. § 6a.

This technical language initially lays down a general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim." §§ 6a(1), (2).

We ask here how this language applies to price-fixing activity that is in significant part foreign, that has the requisite domestic effect, and that also has independent foreign effects giving rise to the plaintiff's claim.

III

Respondents make a threshold argument. They say that the transactions here at issue fall outside the FTAIA because the FTAIA's general exclusionary rule applies only to conduct involving exports. The rule says that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) *with* foreign nations." § 6a (emphasis added). The word "with" means

between the United States and foreign nations. And, they contend, commerce between the United States and foreign nations that is not import commerce must consist of export commerce – a kind of commerce irrelevant to the case at hand.

The difficulty with respondents' argument is that the FTAIA originated in a bill that initially referred only to "export trade or export commerce." H. R. 5235, 97th Cong., 1st Sess., § 1 (1981). But the House Judiciary Committee subsequently changed that language to "trade or commerce (other than import trade or import commerce)." 15 U.S.C. § 6a. And it did so deliberately to include commerce that did not involve American exports but which was wholly foreign.

The House Report says in relevant part:

> "The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations. . . . *Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions* – that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. The Committee Amendment therefore deletes references to 'export' trade, and substitutes phrases such as 'other than import' trade. *It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment,* but that import transactions are not." House Report 9-10 (emphases added).

For those who find legislative history useful, the House Report's account should end the matter. Others, by considering carefully the amendment itself and the lack of any other plausible purpose, may reach the same conclusion,

namely that the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign.

IV

We turn now to the basic question presented, that of the exception's application. Because the underlying antitrust action is complex, potentially raising questions not directly at issue here, we reemphasize that we base our decision upon the following: The price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect. In these circumstances, we find that the FTAIA exception does not apply (and thus the Sherman Act does not apply) for two main reasons.

First, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, *e.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383 (1959) (application of Jones Act in maritime case); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (same). This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow. See Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2) (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State); *Murray* v. *Schooner Charming Betsy*, 6 U.S. 64, 2 Cranch 64 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (identifying rule of construction as derived from the principle of "prescriptive comity").

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world.

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-444 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law P 236 (1978).

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See Restatement § 403(2) (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

We recognize that principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of *American* companies, see Restatement § 402; and some of the anticompetitive price-fixing conduct alleged here took place in *America*. But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct *that Congress sought to forbid*, for Congress did not seek to forbid any such conduct insofar as it is here relevant, *i.e.*, insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of course, did make an exception where that conduct also causes domestic harm. See House Report 13 (concerns about American firms' participation in international cartels addressed through "domestic injury" exception). But any independent domestic harm the foreign conduct causes here has, by definition, little or nothing to do with the matter.

We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question.

The Areeda and Hovenkamp treatise notes that under the Court of Appeals' interpretation of the statute

> "a Malaysian customer could . . . maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own

> sovereign's provisions for private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U. S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have intended that result." P. Areeda & H. Hovenkamp, Antitrust Law P 273, pp 51-52 (Supp 2003).

We agree with the comment. We can find no convincing justification for the extension of the Sherman Act's scope that it describes.

Respondents reply that many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal. Leaving price fixing to the side, however, this Court has found to the contrary. See, *e.g.*, *Hartford Fire*, 509 U.S. at 797-799 (noting that the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy); see also, *e.g.*, 2 W. Fugate, Foreign Commerce and the Antitrust Laws § 16.6 (5th ed. 1996) (noting differences between European Union and United States law on vertical restraints).

Regardless, even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. See, *e.g.*, 2 ABA Section of Antitrust Law, Antitrust Law Developments 1208-1209 (5th ed. 2002). And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody. *E.g.*, Brief for Federal Republic of Germany et al. as *Amici Curiae* 2 (setting forth

German interest "in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs – whose injuries were sustained in transactions entirely outside United States commerce – seeking treble damages in private lawsuits against German companies"); Brief for Government of Canada as *Amicus Curiae* 14 ("treble damages remedy would supersede" Canada's "national policy decision"); Brief for Government of Japan as *Amicus Curiae* 10 (finding "particularly troublesome" the potential "interfere[nce] with Japanese governmental regulation of the Japanese market").

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty. Brief for Federal Republic of Germany et al. as *Amici Curiae* 28-30; Brief for Government of Canada as *Amicus Curiae* 11-14. See also Brief for United States as *Amicus Curiae* 19-21 (arguing the same in respect to American antitrust enforcement).

Respondents alternatively argue that comity does not demand an interpretation of the FTAIA that would exclude independent foreign injury cases *across the board*. Rather, courts can take (and sometimes have taken) account of comity considerations case by case, abstaining where comity considerations so dictate. Cf., *e.g.*, *Hartford Fire*, *supra*, at 797, n. 24; *United States* v. *Nippon Paper Industries Co.*, 109 F.3d 1, 8 (CA1 1997); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1294-1295 (CA3 1979).

In our view, however, this approach is too complex to prove workable. The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial

product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings--to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system. Even in this relatively simple price-fixing case, for example, competing briefs tell us (1) that potential treble-damage liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) the opposite, namely that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty programs). Compare, *e.g.*, Brief for Certain Professors of Economics as *Amici Curiae* 2-4 with Brief for United States as *Amicus Curiae* 19-21. How could a court seriously interested in resolving so empirical a matter – a matter potentially related to impact on foreign interests – do so simply and expeditiously?

We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

Second, the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce. See House Report 2-3. And we have found no significant indication that at the time

Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances.

The Solicitor General and petitioners tell us that they have found no case in which any court applied the Sherman Act to redress foreign injury in such circumstances. Tr. of Oral Arg. 21; Brief for United States as *Amicus Curiae* 13; Brief for Petitioners 13; see also *Den Norske*, 241 F.3d at 429 ("[W]e have found no case in which jurisdiction was found in a case like this – where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market"). And respondents themselves apparently conceded as much at a May 23, 2001, hearing before the District Court below. 2001 WL 761360, at *4.

Nevertheless, respondents now have called to our attention six cases, three decided by this Court and three decided by lower courts. In the first three cases the defendants included both American companies and foreign companies jointly engaged in anticompetitive behavior having both foreign and domestic effects. See *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 595 (1951) (agreements among American, British, and French corporations to eliminate competition in the manufacture and sale of anti-friction bearings in world, including United States, markets); *United States* v. *National Lead Co.*, 332 U.S. 319, 325-328 (1947) (international cartels with American and foreign members, restraining international commerce, including United States commerce, in titanium pigments); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 171-172 (1911) (American tobacco corporations agreed in England with British company to divide world markets). In all three cases the plaintiff sought relief, including relief that might have helped to protect those injured abroad.

In all three cases, however, the plaintiff was the Government of the United States. A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive

conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. 15 U.S.C. § 25; see also, *e.g.*, *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) ("[I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor"). Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief. See *California* v. *American Stores Co.*, 495 U.S. 271, 295 (1990) ("Our conclusion that a district court has the power to order divestiture in appropriate cases brought [by private plaintiffs] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief"); 2 P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 303d-303e, pp 40-45 (2d ed. 2000) (distinguishing between private and government suits in terms of availability, public interest motives, and remedial scope); Griffin, Extraterritoriality in U. S. and EU Antitrust Enforcement, 67 Antitrust L. J. 159, 194 (1999) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U. S. Government"). This difference means that the Government's ability, in these three cases, to obtain relief helpful to those injured abroad tells us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.

Neither did the Court focus explicitly in its opinions on a claim that the remedies sought to cure only independently caused foreign harm. Thus the three cases tell us even less about whether this Court then thought that foreign private plaintiffs could have obtained foreign relief based solely upon such independently caused foreign injury.

Respondents also refer to three lower court cases brought by private plaintiffs. In the first, *Industria Siciliana Asfalti, Bitumi, S. p. A.* v. *Exxon Research & Engineering Co.*, 1977 WL 1353 (SDNY, Jan. 18, 1977), a District Court permitted

an Italian firm to proceed against an American firm with a Sherman Act claim based upon a purely foreign injury, *i.e.*, an injury suffered in Italy. The court made clear, however, that the foreign injury was "*inextricably bound up with . . . domestic restraints of trade*," and that the plaintiff "*was injured . . . by reason of an alleged restraint of our domestic trade*," *id.*, 1977 U.S. Dist. LEXIS 17851 at *11, *12 (emphasis added), *i.e.*, the foreign injury was dependent upon, *not independent of*, domestic harm. See Part VI, *infra*.

In the second case, *Dominicus Americana Bohio* v. *Gulf & Western Industries, Inc.*, 473 F. Supp. 680 (SDNY 1979), a District Court permitted Dominican and American firms to proceed against a competing American firm and the Dominican Tourist Information Center with a Sherman Act claim based upon injury apparently suffered in the Dominican Republic. The court, in finding the Sherman Act applicable, weighed several different factors, including the participation of American firms in the unlawful conduct, the partly domestic nature of both conduct and harm (to American tourists, a kind of "export"), and the fact that the domestic harm depended in part upon the foreign injury. *Id.*, at 688. The court did not separately analyze the legal problem before it in terms of independently caused foreign injury. Its opinion simply does not discuss the matter. It consequently cannot be taken as significant support for application of the Sherman Act here.

The third case, *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 72 (CA2 1977), involved a claim by Hunt, an independent oil producer with reserves in Libya, that other major oil producers in Libya and the Persian Gulf (the "seven majors") had conspired in New York and elsewhere to make it more difficult for Hunt to reach agreement with the Libyan government on production terms and thereby eliminate him as a competitor. The case can be seen as involving a primarily foreign conspiracy designed to bring about foreign injury in Libya. But, as in *Dominicus*, the court nowhere considered the problem of independently caused foreign harm. Rather,

the case was about the "act of state" doctrine, and the sole discussion of Sherman Act applicability – one brief paragraph – refers to other matters. 550 F.2d at 72, and n 2. We do not see how Congress could have taken this case as significant support for the proposition that the Sherman Act applies in present circumstances.

The upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume. Indeed, a leading contemporaneous lower court case contains language suggesting the contrary. See *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 613 (CA9 1976) (insisting that the foreign conduct's domestic effect be "sufficiently large to present a cognizable injury *to the plaintiffs*" (emphasis added)).

Taken together, these two sets of considerations, the one derived from comity and the other reflecting history, convince us that Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.

V

Respondents point to several considerations that point the other way. For one thing, the FTAIA's language speaks in terms of the Sherman Act's *applicability* to certain kinds of *conduct*. The FTAIA says that the Sherman Act applies to foreign "conduct" with a certain kind of harmful domestic effect. Why isn't that the end of the matter? How can the Sherman Act both *apply to the conduct* when one person sues but *not apply to the same conduct* when another person sues? The question of who can or cannot sue is a matter for other statutes (namely, the Clayton Act) to determine.

Moreover, the exception says that it applies if the conduct's domestic effect gives rise to "*a* claim," not to "*the plaintiff's* claim" or "*the* claim *at issue*." 15 U.S.C. § 6a(2) (emphasis added). The alleged conduct here did have domestic effects, and those effects were harmful enough to

give rise to "a" claim. Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguistically speaking, they say, that is beside the point. Nor did Congress place the relevant words "gives rise to a claim" in the FTAIA to suggest any geographical limitation; rather it did so for a here neutral reason, namely, in order to make clear that the domestic effect must be an *adverse* (as opposed to a beneficial) effect. See House Report 11 (citing *National Bank of Canada* v. *Interbank Card Asso.*, 666 F.2d 6, 8 (CA2 1981)).

Despite their linguistic logic, these arguments are not convincing. Linguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances; and those other circumstances may include the nature of the lawsuit (or of the related underlying harm). It also makes linguistic sense to read the words "a claim" as if they refer to the "plaintiff's claim" or "the claim at issue."

At most, respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language. But those arguments do not show that we *must* accept that reading. And that is the critical point. The considerations previously mentioned – those of comity and history – make clear that the respondents' reading is not consistent with the FTAIA's basic intent. If the statute's language reasonably permits an interpretation consistent with that intent, we should adopt it. And, for the reasons stated, we believe that the statute's language permits the reading that we give it.

Finally, respondents point to policy considerations that we have previously discussed, *supra*, at ____, namely, that application of the Sherman Act in present circumstances will (through increased deterrence) help protect Americans against foreign-caused anticompetitive injury. As we have explained, however, the plaintiffs and supporting enforcement-agency *amici* have made important experience-backed arguments (based upon amnesty-seeking incentives) to the contrary. We

cannot say whether, on balance, respondents' side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion.

For these reasons, we conclude that petitioners' reading of the statute's language is correct. That reading furthers the statute's basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history.

VI

We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury. Respondents argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct's domestic effects were linked to that foreign harm. Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury. They add that this "but for" condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception.

The Court of Appeals, however, did not address this argument, 315 F.3d at 341, and, for that reason, neither shall we. Respondents remain free to ask the Court of Appeals to consider the claim. The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice O'Connor took no part in the consideration or decision of this case.

CONCUR: Justice Scalia, with whom Justice Thomas joins, concurring in the judgment.

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

EMPAGRAN S.A., ET AL., APPELLANTS

v.

F. HOFFMAN-LAROCHE, LTD., ET AL., APPELLEES

No. 01-7115

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September 9, 2002, Argued
January 17, 2003, Decided

COUNSEL: Paul T. Gallagher argued the cause for appellants. With him on the briefs was Michael D. Hausfeld. Ann C. Yahner entered an appearance.

Charles S. Duggan argued the cause for appellees. With him on the brief were Arthur F. Golden, Bruce L. Montgomery, Stephen Fishbein, Tyrone C. Fahner, Andrew S. Marovitz, John M. Majoras, Lawrence Byrne, Michael L. Denger, D. Stuart Meiklejohn, Laurence T. Sorkin, Roy L. Regozin, Paul P. Eyre, Marcia E. Marsteller, Donald I. Baker, W. Todd Miller, Alice G. Glass, Peter E. Halle, Thomas J. Lang, James R. Weiss, Elizabeth W. Fleming, Craig M. Walker, Fred W. Reinke, Thomas M. Mueller, Michael O. Ware, Aileen Meyer, Sutton Keany, Bryan Dunlap, Martin Frederic Evans, Karen N. Walker, Moses Silverman, Kevin R. Sullivan, and Jeffrey S. Bucholtz. Thomas S. Martin, Kate Usdrowski, Matthew Solum, Carl W. Riehl and John S. Kiernan entered appearances.

JUDGES: Before: EDWARDS, HENDERSON, and ROGERS, Circuit Judges. Opinion for the Court filed by Circuit Judge EDWARDS. Dissenting opinion filed by Circuit Judge HENDERSON.

OPINION

EDWARDS, Circuit Judge: The action in this case was filed under section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and 26, the antitrust laws of foreign nations, and international law, on behalf of all foreign purchasers of certain vitamins, vitamin premixes, and bulk vitamin products and precursors, against a number of corporations, both foreign and domestic, who distribute and sell these vitamin products around the world. Appellants contend that appellees engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins; that this cartel operated on a global basis and affected virtually every market where appellees operated worldwide; and that appellees' unlawful price-fixing conduct had adverse effects in the United States and in other nations that caused injury to appellants in connection with their foreign purchases of vitamin products. Appellees moved to dismiss the action in the District Court, asserting that the court lacked subject matter jurisdiction under the federal antitrust laws, because the injuries plaintiffs sought to redress were allegedly sustained in transactions that lack any direct connection to United States commerce. The District Court granted the motion to dismiss and appellants now appeal.

This appeal requires us to interpret the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, to determine the jurisdictional reach of the federal antitrust laws. FTAIA, which amended the Sherman Act, provides that the Sherman Act "shall not apply to conduct" involving trade or commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on trade or commerce in the United States, and "such effect gives rise to a claim" under the provisions of the Sherman Act. Section 6a(1) of FTAIA makes it clear that our federal antitrust laws regulate foreign conduct only where that conduct has the proscribed "effects" on domestic or foreign United States commerce. And § 6a(2) of FTAIA provides that the antitrust laws are inapplicable unless the effect of extraterritorial

conduct on United States commerce "gives rise to a claim" under the Sherman Act. The District Court held that, under FTAIA, a plaintiff must establish that the injuries it seeks to remedy actually arose from the anticompetitive effects of the defendants' conduct on United States commerce. In other words, it is not enough for a plaintiff to show that other persons were injured by such United States effects; the United States effects themselves must give rise to plaintiff's claim. This *restrictive view* of FTAIA's jurisdictional reach finds support in the Fifth Circuit. *See Den Norske Stats Oljeselskap As* v. *Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001).

Appellants contend that the District Court misconstrued FTAIA. According to appellants, FTAIA applies to "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on United States commerce, *if* – not merely to the extent that – the requisite United States effects are found. Thus, according to appellants, Congress did not limit jurisdiction to "the same claim" as that on which the jurisdictional effects are based. Rather, Congress provided only that "a" claim cognizable under the Sherman Act must exist. Once a jurisdictional nexus exists, FTAIA does not limit the types of plaintiffs who may seek relief. Thus, according to appellants, it does not matter that the transactions in which they purchased vitamins took place outside of United States commerce. This *less restrictive view* of FTAIA's jurisdictional reach finds support in the Second Circuit. *See Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

In the alternative, appellants claim that their complaint states a viable cause of action even under the District Court's *restrictive view* of FTAIA. Appellants contend that appellees caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, appellants say, but the cartel raised prices around the world in order to keep prices in equilibrium with United

States prices in order to avoid a system of arbitrage. Thus, according to appellants, the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, appellants claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad. The District Court did not address this alternative theory of jurisdiction. Neither the Second Circuit nor the Fifth Circuit embrace this view of FTAIA's jurisdictional reach, nor do we. In light of our disposition in favor of appellant on other grounds, we find it unnecessary to address this "alternative" theory of subject matter jurisdiction.

We can find no "plain meaning" in § 6a(2) of FTAIA. Nor do we find any easy resolution of this case by reference to the decisions of the Second and Fifth Circuits. The majority opinion in *Den Norske Stats Oljeselskap As* v. *Heeremac Vof* seems to us to endorse a view of FTAIA that is overly rigid, in light of the words of the statute and relevant portions of the legislative history. And, as we explain below, the opinion in *Kruman* v. *Christie's International PLC* seems to reach too far in its view of subject matter jurisdiction. Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former.

We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Although the language of § 6a(2) does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of

deterrence emanating from the Supreme Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978).

Because the foreign plaintiffs here have alleged that the United States effects of appellees' cartel give rise to antitrust claims by parties injured in the United States from transactions occurring in the United States, we hold that subject matter jurisdiction is proper. We also find that appellants have standing to sue under the antitrust laws. We therefore reverse the District Court's decision, vacate the judgment against appellants, and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

Section 1 of the Sherman Act makes unlawful "every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations...." 15 U.S.C. § 1. Section 4 of the Clayton Act confers a cause of action on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for treble damages. *Id.* § 15(a). Section 16 of the Clayton Act entitles "any person, firm, corporation or association ... to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws...." *Id.* § 26. In 1982, Congress enacted FTAIA, which amended the Sherman Act to make the Sherman Act inapplicable to non-import foreign commerce unless the conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and "such effect gives rise to a claim under" the Sherman Act. *Id.* § 6a. The text of FTAIA provides, in full:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect-

> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Id.

Appellees ("vitamin companies") are manufacturers and distributors of vitamins and vitamin products. Appellants ("foreign purchasers" or "foreign plaintiffs") are foreign corporations domiciled in various foreign countries, who purchased vitamins abroad from the vitamin companies or their alleged co-conspirators from January 1, 1988 to February 1999, for delivery outside the United States. The plaintiffs in this case originally filed a class action suit on behalf of foreign and domestic purchasers of vitamins, alleging "a massive and long-running conspiracy" among the vitamin companies and their co-conspirators "with the purpose and effect of fixing prices, allocating market share, and committing other unlawful practices designed to inflate the prices of various vitamins ... sold to the Plaintiffs and other purchasers both within and outside the United States." Amend. Compl. at ¶ 1, Joint Appendix ("J.A.") 15-16. The plaintiffs sought injunctive relief and damages under § 1 of the Sherman Act; § § 4 and 16 of the Clayton Act; the antitrust laws of relevant foreign nations; and international law. *Id.* at ¶ 7, J.A. 19.

The vitamin companies moved to dismiss the suit as to the foreign plaintiffs pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction under the federal antitrust laws, and for lack of standing under the federal antitrust laws. They also urged the District Court to decline to exercise supplemental jurisdiction over the foreign law claims, and to dismiss the international law claims for failure to state a claim upon which relief may be granted. The District Court held that it lacked subject matter jurisdiction under FTAIA over the foreign plaintiffs' claims. *See Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at 2-4 (D.D.C. June 7, 2001). The "critical question in this case," the District Court stated, "is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." *Id.* at 2. The District Court held that, because the conspiracy's effect on U.S. commerce did not cause the foreign purchasers' injury, the court did not have jurisdiction over the foreign purchasers' claims. *See id.* at 2-4.

Because the District Court dismissed the foreign purchaser's federal claims for lack of subject matter jurisdiction, it found that it did not need to reach the issue of standing with respect to the foreign plaintiffs. *See id.* at 5. The District Court declined to exercise supplemental jurisdiction over the foreign purchasers' foreign law claims, because "these foreign law claims raise novel and complex issues of foreign law, the court has already dismissed all federal claims brought by the foreign plaintiffs for lack of subject matter jurisdiction," and because of "comity and efficiency reasons." *Id.* at 8. Finally, the District Court dismissed the foreign purchasers' claims under customary international law for failure to state a claim, because the court could not find the existence of a customary international law proscribing the conduct alleged. *See id.* at 9. The foreign purchasers filed an interlocutory appeal.

At the time of its decision, the District Court deferred ruling on the defendants' motion to dismiss the domestic plaintiffs' federal antitrust claims, and directed the domestic plaintiffs to supplement their complaint to provide more detailed factual allegations. *Id.* at 4, 6. At the suggestion of the District Court, for practicality, *see id.* at 7 n.5, the domestic plaintiffs in the case subsequently entered into a court-approved stipulation that transferred their claims to another action pending before the District Court, *Procter & Gamble Co.* v. *BASF AG*, No. 99-3046 (M.D.L. No. 1285), which involved similar claims against substantially the same defendants. The parties thereby agreed that the domestic plaintiffs had no pending claims in the instant case. On September 10, 2001, the District Court granted the defendants' motion for an order directing entry of final judgment, and on April 26, 2002, the District Court entered final judgment for the defendants in the instant case. The foreign plaintiffs' appeal is therefore no longer interlocutory.

II. ANALYSIS

A. Subject Matter Jurisdiction

This court reviews *de novo* the District Court's dismissal of a complaint for lack of subject matter jurisdiction. *Nat'l Taxpayers Union, Inc.* v. *United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995). A complaint may be dismissed for lack of subject matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sinclair* v. *Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). In our review, this court assumes the truth of the allegations made and construes them favorably to the pleader. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

In this case, the foreign purchasers, who bought vitamins exclusively outside the United States, allege that the vitamin companies conspired to fix vitamin prices around the world, and that the foreign purchasers paid inflated prices for

vitamins abroad as a result of the global conspiracy. FTAIA makes the Sherman Act inapplicable to conduct in foreign commerce unless the conduct has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce and "such effect gives rise to a claim under" the Sherman Act. *See* 15 U.S.C. § 6a(1).

As an initial matter, the parties appear to dispute the scope of the "conduct" that should be considered for our FTAIA analysis. Essentially, appellants argue that the relevant conduct is the "massive international cartel, exercising global market power." Appellants' Br. 19. Appellees argue that the relevant conduct is solely the market transactions between them and the foreign plaintiffs overseas. Appellees' Br. 20-21. Both the Second and Fifth Circuits have adopted appellants' approach, and appellants' approach is correct. *See Kruman*, 284 F.3d at 398; *Den Norske*, 241 F.3d at 426. Indeed, the *Kruman* court rejected a narrow definition of "conduct" as "the precise acts that caused injury," and instead adopted a broader definition of "conduct" as "acts that are illegal under the Sherman Act," that is, the international price-fixing conspiracy. *Kruman*, 284 F.3d at 398. The complaint in this case alleges an international price-fixing conspiracy among the vitamin companies, and appellees "do not contest that the vitamin cartel produced substantial effects in the United States" for the purpose of this appeal. Oral Argument Transcript, at 30-31. In light of this concession by appellees, it is unnecessary for us to explore further the precise parameters of the definition of "conduct," since there is no real dispute that the vitamin companies' conduct had "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce. We therefore accept that the "direct, substantial, and reasonably foreseeable effect" requirement under § 6a(1) of FTAIA is met. Additionally, in light of appellees' concession that the vitamin cartel produced substantial effects on U.S. commerce, it is unnecessary for us to address appellees' argument that regulating foreign business

transactions would exceed the powers granted to Congress under the Commerce Clause. *See* Appellees' Br. 16-17.

The precise issue presented in this appeal is whether the "gives rise to a claim" requirement under § 6a(2) of FTAIA authorizes subject matter jurisdiction where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's claim arises only from the conduct's foreign effect. In other words, the question is whether FTAIA precludes actions under the Sherman Act unless a plaintiff shows that the injuries it seeks to remedy arise from the anticompetitive effects of the defendant's conduct on U.S. commerce; or, alternatively, is it enough for a plaintiff to show that the anticompetitive effects of the defendant's conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court.

The Supreme Court first addressed the foreign reach of the Sherman Act in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909) (Holmes, J.), which held that the Sherman Act did not apply to conduct occurring outside the United States. Eighteen years later, the Court moderated this approach, and held that the Sherman Act authorized jurisdiction over foreign defendants, as long as some of the defendants' conduct occurred within the United States and the conduct affected domestic commerce. *See United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927).

In 1945, in an important opinion by Judge Learned Hand, the Second Circuit held that a federal court has jurisdiction over foreign conduct as long as the conduct was intended to, and actually did, affect U.S. commerce. *See United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) ("*Alcoa*"). Judge Hand said that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.* at 443. Under *Alcoa*, jurisdiction depends upon whether the conduct had an effect

on domestic commerce, not where the conduct took place. "Conduct which has no consequences within the United States" does not come within the reach of U.S. antitrust laws. *Id. Alcoa's* "effects test" is now well accepted. *See, e.g., Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."); *see also* IA PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTI- TRUST LAW ¶ 270, at 336 (2d ed. 2000) ("The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States."). The Supreme Court expressly embraced the "effects test" in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993), stating that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 796 (citing *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Alcoa*, 148 F.2d at 444).

In 1982, Congress enacted FTAIA, to "encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services." H.R. REP. NO. 97-686, at 2 (1982). As the Supreme Court has noted, "FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire Ins.*, 509 U.S. at 796-97 n.23 (citations omitted). FTAIA was also passed to enact a "single, objective test – the 'direct, substantial, and reasonably foreseeable effect' test" that "will serve as a simple and straightforward clarification of existing American law...." H.R. REP. NO. 97-686, at 2. FTAIA thus endorsed *Alcoa*'s "effects test." *See id.* at 5 ("Since Judge Learned Hand's opinion in [*Alcoa*], it has been relatively clear that it is the

situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.").

Since the enactment of FTAIA, the D.C. Circuit has had one occasion to apply the statute. In *Caribbean Broadcasting System, Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080, 1086-87 (D.C. Cir. 1998), the considered whether FTAIA authorizes subject matter jurisdiction over a Caribbean radio station's claim that a competing Caribbean radio station violated the Sherman Act by falsely telling U.S. advertisers that its own radio signal reached the entire Eastern Caribbean so that the advertisers would believe that it alone could fulfill their advertising needs. The precise question was whether the complaint by a foreign plaintiff against a foreign defendant adequately alleged that the latter's anticompetitive conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by FTAIA's first prong. This court found that the anticompetitive conduct of the defendant radio station harmed the U.S. advertisers who had to pay higher prices because of it. We stated: "In this context it appears that antitrust injury to [the plaintiff] is ultimately a harm to U.S. purchasers of radio advertising. By keeping [the plaintiff] out of the market, [the defendant] denied such purchasers the benefit of competition." *Id.* Thus, we held that FTAIA authorized subject matter jurisdiction in that case.

The decision in *Caribbean* did not expressly address FTAIA's second prong – requiring that the effects of the anticompetitive conduct on U.S. commerce "give[] rise to a claim under" the antitrust laws – which is at issue in the instant appeal. However, in the course of addressing the first prong's "direct, substantial, and reasonably foreseeable effect" requirement, the *Caribbean* decision noted that the foreign radio station's "antitrust injury ... is ultimately a harm to U.S. purchasers of radio advertising." *Id.* This conclusion followed from the facts of that case, in which the foreign company's injury and the U.S. purchasers' injury were two sides of the same coin: the defendant radio station's false representations to its U.S. advertisers had the effect of

misleading the U.S. advertisers, and causing them to buy advertising from the false advertiser at inflated prices; these purchases based on false information were what shut the plaintiff radio station out of the advertising market. Thus, it is possible to read *Caribbean* to have assumed, on the facts of that case, that the effect of the conduct on U.S. commerce gave rise to the plaintiff's claim. If so, *Caribbean* simply did not address the question at issue in the instant case, where the effect of the vitamin companies' conduct on U.S. commerce does not give rise to the plaintiffs' claim for redress.

There is another equally plausible way to read the *Caribbean* decision. Although the foreign plaintiff's loss of opportunity to sell advertising and the higher prices paid by U.S. advertisers were clearly interrelated, the higher prices paid by U.S. advertisers did not cause or give rise to the foreign plaintiff's loss of opportunity to sell advertising. One then could not say that the U.S. effect "gave rise to" the plaintiff's claim. It is thus possible that *Caribbean* impliedly interpreted the "gives rise to a claim" prong of FTAIA to be satisfied even where the U.S. effect does not "give rise to" the foreign plaintiff's claim.

We need not determine which of these two readings of FTAIA's second prong is implied by *Caribbean*. Both interpretations appear plausible. Compare, *e.g.*, *Den Norske*, 241 F.3d at 430 ("The effect on United States commerce in [*Caribbean*] ... gave rise to the injury suffered by the plaintiff, a competing radio station – that is, exclusion of the plaintiff from the market for United States advertising dollars."), with *id.*, 241 F.3d at 436-37 (Higginbotham J, dissenting) ("[*Caribbean*] did not require that the injury to American advertisers 'give[] rise to' the plaintiff's cause of action; its determination that the injury gave rise to 'a' claim was sufficient."). In any event, because *Caribbean* only addressed FTAIA's "direct, substantial, and reasonably foreseeable effect" prong, we hesitate to derive a firm interpretation of the "gives rise to a claim" prong from that case. The law of the circuit thus leaves unanswered the question whether FTAIA

requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct. This is an issue of first impression in this circuit.

1. Circuit Split

As noted above, the Second and Fifth Circuits have split on this very question of statutory interpretation. The District Court in the instant case followed the Fifth Circuit's *Den Norske* decision, which held that the federal antitrust laws do not apply to claims in which the plaintiff's injury does not arise from the conspiracy's anticompetitive domestic effect. *Den Norske*, 241 F.3d at 427. That is, even if a conspiracy results in higher prices in the United States, that domestic effect must "give rise to" the plaintiff's injury. By contrast, the Second Circuit in *Kruman* held that FTAIA allows suit by a plaintiff whose injury does not arise from the conduct's harm to domestic commerce, as long as that conduct's "domestic effect violated the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 400. As in the instant case, the "direct, substantial, and reasonably foreseeable effect" prong of § 6a(1) was satisfied in those two cases, and the question at issue was whether the "gives rise to a claim" prong of § 6a(2) was satisfied where the U.S. effect of the conduct did not give rise to the plaintiff's claim.

In the Fifth Circuit's *Den Norske* case, a Norwegian oil corporation conducting business exclusively in the North Sea brought an antitrust conspiracy claim against providers of heavy-lift barge services, alleging that the defendants' conduct inflated the plaintiff's operating costs in the North Sea and also inflated oil prices in the U.S. market. The majority opinion in *Den Norske* interpreted the "gives rise to a claim" prong as demanding that the domestic effect give rise to the plaintiff's claim, not merely to someone's claim. *Den Norske*, 241 F.3d at 427. Because the plaintiff's injury arose solely from the foreign effect, and not from the domestic effect of the defendant's conduct, the Fifth Circuit found subject matter jurisdiction lacking.

Judge Patrick Higginbotham dissented, writing that he was "not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct." *Id.* at 431 (Higginbotham J., dissenting). Judge Higginbotham found that the literal text of the words "gives rise to a claim" supported jurisdiction: "The word 'a' has a simple and universally understood meaning. It is the indefinite article... If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have." *Id.* at 432. In light of the purpose of FTAIA "to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce," Judge Higginbotham worried that the majority's "interpretation of the FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States." *Id.* at 433, 434. Judge Higginbotham emphasized the deterrence rationale animating the Sherman and Clayton Acts, and feared that global conspiracies that affect U.S. commerce could be inadequately deterred in the absence of suits by foreign plaintiffs:

> Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

Id. at 435.

In the Second Circuit's *Kruman* case, buyers and sellers at foreign auctions filed suit against the two largest auction

houses, Christie's and Sotheby's, alleging that the auction houses had conspired to fix prices in the United States and abroad for their services as auctioneers, and had inflated commissions. In addressing this claim, the Second Circuit explained that FTAIA is an amendment to the Sherman Act, rather than to the Clayton Act, and, as such, focuses only on the prohibition of a defendant's anticompetitive conduct, rather than on what injury a plaintiff must suffer to bring suit. Thus, the court reasoned, the argument that FTAIA limits liability to injury arising out of the conduct's domestic effect conflates the Clayton Act, to which a plaintiff's injury is relevant, and the Sherman Act, to which only a defendant's conduct is relevant. *See Kruman*, 284 F.3d at 397-99. The court then interpreted the "gives rise to a claim" language as requiring only "that the domestic effect violate the substantive provisions of the Sherman Act," rather than "that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action." *Id.* at 400. The Second Circuit read Congress' use of the indefinite article in "gives rise to a claim" to mean that "the 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act." *Id.*

The Second Circuit also relied on policy considerations in interpreting FTAIA. In line with its view that FTAIA governs what conduct by a defendant is regulated by the Sherman Act, rather than which plaintiffs can bring suit, the court reasoned that

> when anticompetitive conduct is directed at both foreign and domestic markets, the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market. When a foreign scheme magnifies the effect of the domestic scheme, and plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the

> domestic scheme rather than the domestic scheme alone. Our markets suffer when the foreign scheme is not deterred because the domestic scheme may have a greater chance of success when it is supplemented by the foreign scheme.

Id. at 403. Thus, the Second Circuit found that "our markets can benefit from the additional deterrence of conduct affecting foreign markets." *Id.* (citing *Pfizer*, 434 U.S. at 313-15).

2. FTAIA's Language: "Effect" that "Gives Rise to a Claim"

Appellants' and appellees' arguments regarding the meaning of FTAIA's "gives rise to a claim" language largely correspond to the reasoning adopted in the Second Circuit's and the Fifth Circuit's opinions, respectively. On the Fifth Circuit's restrictive view of FTAIA, the statute allows suit only where the plaintiff is injured by the U.S. effects of the anticompetitive conduct. *Den Norske*, 241 F.3d at 427. On the Second Circuit's less restrictive view, the statute also allows suit where the plaintiff is injured in foreign commerce by anticompetitive conduct whose "domestic effect ... violates the Sherman Act," even if the domestic effect of the conduct does not injure the plaintiff. *Kruman*, 284 F.3d at 401.

Appellants make two arguments about the language of FTAIA that we reject. First, echoing the Second Circuit, appellants argue that the Fifth Circuit's restrictive interpretation of "gives rise to a claim" renders superfluous the concluding provision of FTAIA, which states that, if the Sherman Act applies only because the conduct affects "export commerce or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States," 15 U.S.C. § 6a(1)(B), then it applies "to such conduct only for injury to export business in the United States," *id.* § 6a. *See* Appellants' Br. 22-23; *Kruman*, 284 F.3d at 396; *Den Norske*, 241 F.3d at 432 n.5 (Higginbotham, J., dissenting). In other words, if subsections 1 and 2 of FTAIA already provide

that the Sherman Act applies only where the U.S. effect gives rise to the plaintiff's injury, why would Congress need to add the final proviso that, regarding injury to export commerce, the Sherman Act only applies to injury to U.S. export commerce?

We think that there is a reading of the final proviso of FTAIA that would not render it superfluous, even if one were to adopt the Fifth Circuit's and the District Court's restrictive interpretation of "gives rise to a claim." The final proviso could be intended to clarify that, although subsection 1(B) speaks of a "person engaged in" export commerce, the Sherman Act does not extend to *all* injury sustained by such a person as a result of the defendant's anticompetitive conduct, but, rather, only to injury to his export business sustained within the United States. In other words, the proviso precludes an exporter from suing for injury to some aspect of his export business suffered outside the United States. *See* IA AREEDA & HOVENKAMP, *supra*, ¶ 262, at 360 (explaining that the final proviso "is designed to make clear that a foreign firm operating an export business in the United States continues to be protected by the antitrust laws with respect to that business but not with respect to its operations outside the United States"). This limitation would not render the final proviso superfluous under an interpretation of subsection 2 requiring that the plaintiff be injured by the conduct's domestic effect to be able to sue.

Second, appellants place significance on the fact that, in providing that the Sherman Act shall not apply to foreign commerce "unless ... such conduct" has a U.S. effect that "gives rise to a claim," Congress chose the word "unless" rather than the phrase "except to the extent that." Appellants contend that "unless" enables the conduct itself to be actionable so long as the U.S. effect is present, whereas "except to the extent that" would make the Sherman Act apply only to the extent that the conduct that causes the U.S. effect also gives rise to the plaintiffs' claim. *See* Appellants' Br. 17-19. This is overreading. Like the District Court, we are

unconvinced that "unless" and "to the extent that" would have such different meanings in this statute.

At bottom, however, we agree with appellants that § 6a(2) supports subject matter jurisdiction in this case. Although both the Second Circuit and the Fifth Circuit found the "gives rise to a claim" language of § 6a(2) to be plain in opposite ways, we find that the language does not clearly resolve the question whether "a claim" means the plaintiff's claim. The Fifth Circuit's view that "a claim" plainly refers to the plaintiff's claim must depart from the literal language – "gives rise to a claim" – and substitute the words "gives rise to the plaintiff's claim" in order to reach the *plain meaning* to which the court subscribes. The Second Circuit construes broadly Congress' use of the indefinite article in "a claim," such that "a claim" really means "civil action ... by the federal government to enforce or prevent a substantive violation of the Sherman Act pursuant to 15 U.S.C. § 4"; hence, the words "gives rise to a claim" mean that the conduct's domestic effect "only must violate the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 399-400. We think that this interpretation of the words "a claim" gives short shrift to § 6a(2)'s explicit requirement that the domestic effect "give[] rise to a claim" – in other words, the language is far from clear as to whether that requirement can be satisfied merely by a violation of the Sherman Act, rather than by antitrust injury to the plaintiffs or others who could bring a claim under the provisions of the Clayton Act that create a cause of action for Sherman Act violations.

Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former. We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone,

even if not the foreign plaintiff who is before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim. This interpretation has the appeal of literalism. *Cf. Den Norske*, 241 F.3d at 432 (Higginbotham, J., dissenting) ("The word 'a' has a simple and universally understood meaning... If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have.").

Although the language of § 6a(2) does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is a faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence, which we address in parts A.4. and A.5., *infra*. We first consider the Second Circuit's structural argument in support of its less restrictive view of § 6a(2).

3. FTAIA's Structure

Appellants adopt the Second Circuit's structural argument – namely that, because FTAIA amended the Sherman Act rather than the Clayton Act, FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue. *See* Appellants' Reply Br. 6-7; *Kruman*, 284 F.3d at 397-400. Because FTAIA is an amendment to the Sherman Act, this structural argument deems Congress in FTAIA to have addressed only the Sherman Act's prohibition of anticompetitive conduct, putting out of view the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. Appellants argue: "Since the focus of the FTAIA is on the defendants' conduct, which is regulated by the Sherman Act, it is this conduct alone that violates the Sherman Act. To require that the injury of domestic purchasers be the basis for the injury suffered by Plaintiffs ...

improperly imports a concept applicable to Section 4 of the Clayton Act." Appellants' Reply Br. 6-7.

This argument is plausible but ultimately unconvincing. The Clayton Act, which gives plaintiffs a cause of action under the Sherman Act, was in effect at the time that FTAIA was enacted, and FTAIA speaks explicitly of "giving rise to a claim under" the Sherman Act. The concept of a claim arising under the Sherman Act is clearly one that is present in the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. It is thus equally plausible to think that Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of "conduct," "effect," and "claim" the key to FTAIA. The view that FTAIA must be taken to refer only to defendants' conduct tends to ignore the fact that FTAIA does refer on its face to the conduct's effect giving rise to a claim, which arguably refers to a plaintiff's injury. Congress may well have imported a concept from the Clayton Act in amending the Sherman Act, notwithstanding appellants' and the Second Circuit's assumption of categorical precision on Congress' part.

The Second Circuit's heavy reliance on this argument led to its rather expansive holding to the effect that: "Rather than require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action, subsection 2 of the FTAIA only requires that the domestic effect violate the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 400. According to the Second Circuit, "a violation of the Sherman Act is not predicated on the existence of an injury to a plaintiff. In fact, the only civil action that can be brought directly under the Sherman Act is one by the federal government to enforce or prevent a substantive violation of the Sherman Act pursuant to 15 U.S.C. § 4." *Id.* at 399. The Second Circuit thereby held that violation of the Sherman Act is sufficient to meet the "gives rise to a claim" requirement of subsection 2. In the Second Circuit's view, the words "a claim" in FTAIA mean an action by the government, not a

private claim. The Second Circuit justified this view in a footnote, with three arguments: that the definition of the words "a claim" does not exclude this meaning, *id.* at 400 (citing BLACK'S LAW DICTIONARY 240 (7th ed. 1999)); that FTAIA's specific reference to "a claim under the provisions of sections 1 to 7 of this title" means a claim brought *directly* pursuant to the Sherman Act, *id.*; and that Congress has not exclusively used the word "claim" to refer to a private action for damages, *id.* (citing the Federal Trade Commission Act, 15 U.S.C. § 45(a)(3), which gives the FTC "the power to enforce the substantive provisions of the FTCA regardless of whether a plaintiff has suffered injury").

While we acknowledge that the words "a claim" do not necessarily exclude a government action, the usual meaning of "a claim" is a private action. Thus, unlike the Second Circuit, we do not think that violation of the Sherman Act is necessarily the same thing as "giving rise to a claim" under it. Furthermore, the concept of "giving rise to a claim" may well be a concept from the Clayton Act, which creates a private cause of action for Sherman Act violations. As noted above, we believe that, in order to satisfy FTAIA, a plaintiff must show that the anticompetitive conduct violates the Sherman Act and that the conduct's U.S. effect gives rise to someone's claim under it. As the Second Circuit itself noted, "the existence of a Sherman Act violation does not depend on whether anyone has actually suffered an injury. Conduct may violate the Sherman Act but not be actionable under section 4 of the Clayton Act because it did not cause injury." *Kruman*, 284 F.3d at 397 (citing *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989)). "The 'mere presence' of a per se violation under Sherman Act § 1 'does not by itself bestow on any plaintiff a private right of action for damages,' which is a 'gift of section 4 of the Clayton Act.'" II AREEDA & HOVENKAMP, *supra*, § 337c, at 313 (quoting *Indiana Grocery*, 864 F.2d at 1419). And "while actual injury is required to seek treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff

may bring an antitrust action seeking prospective injunctive relief under section 16 of the Clayton Act for conduct violating the Sherman Act without suffering an actual injury." *Kruman*, 284 F.3d at 397 (citing 15 U.S.C. § 26; *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969)). But the Sherman Act may be enforced by the government even when no private plaintiff claims actual or threatened injury. *See* 15 U.S.C. § 4 ("The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys ... to institute proceedings in equity to prevent and restrain such violations.").

We hold that the words "a claim" in subsection 2 of FTAIA refer to a private action, not merely a government action to enforce the Sherman Act. In other words, "giving rise to a claim" means giving rise to someone's private claim for damages or equitable relief. To satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act. In the instant case, the conspiracy's U.S. effects did allegedly injure and did give rise to the claim of some private entities – namely the domestic plaintiffs who filed suit along with the foreign plaintiffs against the vitamin companies.

4. Legislative History

Both appellants and appellees argue that FTAIA's legislative history supports their respective readings of the statute. Parts of the report from the House Committee that drafted FTAIA suggest that plaintiffs injured by the U.S. effects of the anticompetitive conduct may sue, which of course is consistent with the restrictive view of FTAIA's jurisdictional reach. However, there is much in the legislative history to suggest that foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so

long as the conduct also harms U.S. commerce. This legislative history supports the less restrictive view of FTAIA's jurisdictional reach, consistent with the position advanced by appellants and endorsed by the Second Circuit. What is not noteworthy is that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue. This leads us to conclude that the legislative history as a whole supports the less restrictive interpretation of FTAIA that would allow plaintiffs injured by the conduct's foreign effects to bring suit even where the conduct's U.S. effects do not give rise to the plaintiff's claim.

Appellees argue that the following passage from the House Report demonstrates that Congress intended for the Sherman Act to apply only in cases where the plaintiff's injury arose from anticompetitive effect on U.S. commerce:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language ... to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States... It is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States...

H.R. REP. NO. 97-686, at 11-12. This passage states that the U.S. "'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws,"

which is consistent with appellees' restrictive view that the plaintiffs' injury must arise from the conduct's U.S. effect. However, the sentences that immediately follow make clear that "it is sufficient that the conduct providing the basis of the claim has had the requisite impact on" U.S. commerce, which supports appellants' broader view of the statute's "gives rise to a claim" requirement. Indeed, the "this does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States" language, which follows immediately after the discussion of the restrictive view, strongly suggests that Congress did not intend to exclude the less restrictive basis for subject matter jurisdiction under FTAIA.

Under the heading "Imports and Purely Foreign Transactions," the House Report states:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.... There should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor... It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.

Id. at 9-10. This passage also suggests that the restrictive view of the statute does not exclude the less restrictive interpretation. On the one hand, the antitrust laws do not extend to "wholly foreign transactions," such as a transaction between two foreign firms. On the other hand, when the passage is read as a whole, this restriction seems to be contemplated only where there is no "direct, substantial and reasonably foreseeable effect on domestic commerce." This implies that where there *is* such an effect, jurisdiction over foreign transactions is proper. This surely does not support appellees' view of the statute.

Parts of FTAIA's legislative history plainly support the broader view of the statute. For example, the House Report states that

> the domestic "effect" that may serve as the predicate for antitrust jurisdiction ... must be of the type that the antitrust laws prohibit... For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

H.R. REP. NO. 97-686, at 11. The focus here seems to be on whether the conduct's domestic effect violates the antitrust laws, rather than on whether the conduct's domestic effect gives rise to the plaintiff's claim. This passage suggests that the plaintiff need only allege that the defendant's conduct actually had an effect on the domestic market and that such effect violated the antitrust laws. But more tellingly, in the course of explaining that a plaintiff whose "damage claim is based on an extraterritorial effect" cannot establish jurisdiction where the conduct has a "*beneficial* effect within the United States," the passage implicitly assumes that a plaintiff whose claim is based on a foreign effect *can* establish jurisdiction where the conduct has a *harmful* effect within the United States. This example addresses the situation in which the same conduct has both domestic and foreign effects, and clearly assumes that the plaintiff's claim does not arise from the conduct's U.S. effect. It specifies that the hypothetical beneficial U.S. effect could be "increased profitability of some other company or increased domestic employment," which obviously could not give rise to a claim under the antitrust laws. But significantly, this example does not assume that the fact that the claim arises from something other than the U.S. effect precludes subject matter jurisdiction. Rather, it is clearly the fact of the U.S. effect

being beneficial – and therefore the absence of harmful effect under the "effect" prong – that would render jurisdiction improper. This passage thus suggests that the plaintiff can invoke jurisdiction where the anticompetitive conduct's U.S. effect does not give rise to the plaintiff's claim, as long as the conduct has a harmful, not beneficial, effect on U.S. commerce.

In another passage, the House Report states:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country – by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices – the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

H.R. REP. NO. 97-686, at 13. This suggests that Congress intended for subject matter jurisdiction to exist over the conduct of an international cartel that had an effect on domestic commerce, even if the plaintiff's claim does not arise from that domestic effect. Again, the focus for subject matter jurisdiction purposes here is on whether the defendant's conduct has "the requisite impact on United States commerce," rather than whether the plaintiff in particular was injured by that impact. This passage's example of a domestic export cartel, which presumably directs its anticompetitive conduct to foreign markets, but whose conduct also has a "'spillover' effect on commerce within this country" exemplifies this point, because such a cartel's conduct would give rise to claims by foreign and domestic plaintiffs. In understanding the conduct of such a cartel to be

likely to "fall within the reach of our antitrust laws," nothing in this passage restricts that reach to suits *only* by the domestic plaintiffs injured by the conduct's spillover effects. Admittedly, nothing in this passage explicitly allows suits by plaintiffs injured abroad by a "world-wide shortage or artificially inflated world-wide price" rather than by the domestic spillover effects. But we think that given the clear concern here with the *conduct* that creates the world-wide shortage or price inflation that in turn creates domestic spillover effects, it would be counter-intuitive and arbitrary to read Congress to intend to limit jurisdiction to only the subset of claims brought by plaintiffs injured by the spillover effects of the conduct at issue. Since the same conduct injures both foreign plaintiffs and domestic plaintiffs, and it is clearly the conduct that Congress aims to reach with our antitrust laws, it is reasonable to read Congress as envisioning suits by any plaintiffs who would enable our antitrust laws to reach and deter that conduct.

The House Report makes this point explicit:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States – *e.g.*, price fixing not limited to the export market – would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. Cf., *e.g.*, *Pfizer Inc., et al.* v. *Government of India, et al.*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.

Id. at 10. Explicitly envisioning recovery for plaintiffs who "*suffer economic injury abroad,*" *this passage seems to* support appellants' less restrictive reading of the statute. But appellees point out that this passage, which seems to allow recovery by foreign plaintiffs injured abroad as long as the conduct has the "requisite domestic effects," also expressly states that "foreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace" (emphasis added). This sentence suggests that foreign plaintiffs can sue under the antitrust laws for injury suffered in the domestic market. Arguably, this statement lends some support to appellees' restrictive view of the statute, but not much.

In sum, there is much in the legislative history that supports the *less restrictive view* of FTAIA's jurisdictional reach. There are isolated statements that are consistent with the restrictive view, but they are never offered to denigrate or exclude the less restrictive view of the statute. This is telling, we think, for if Congress intended to reject the less restrictive view of FTAIA's jurisdictional reach, there was absolutely no reason to discuss this possible basis for subject matter jurisdiction along with the restrictive view. We therefore conclude that the less restrictive view of jurisdiction is consistent with a literal interpretation of § 6a(2), and this interpretation is perfectly consistent with the legislative history.

5. Deterrence

The Supreme Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), which was issued before Congress enacted FTAIA, is cited approvingly in the legislative history to FTAIA. *See* H.R. REP. NO. 97-686, at 10. *Pfizer* therefore may offer some clues as to Congress' intent in enacting FTAIA.

In *Pfizer*, the Supreme Court articulated policy reasons for holding that a foreign plaintiff was entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Noting that one purpose of § 4 of the Clayton

Act is "to deter violators and deprive them of 'the fruits of their illegality,'" the Supreme Court reasoned that denying a foreign plaintiff injured by an antitrust violation the right to sue "would permit a price fixer or a monopolist to escape full liability for his illegal actions" and "would lessen the deterrent effect" of the antitrust laws. *See Pfizer*, 434 U.S. at 314-15 (citations omitted). Moreover,

> if foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefitted by the maximum deterrent effect of treble damages upon all potential violators.

Id. at 315.

On this deterrence logic, the Second Circuit in *Kruman* refuted the view that suits by domestic plaintiffs injured by a global conspiracy's domestic effects could adequately enforce our antitrust laws. The Second Circuit noted that, when a foreign anticompetitive scheme enhances the success of a domestic scheme, the perpetrator would have a greater incentive to pursue the global scheme, which would ultimately harm U.S. consumers if a plaintiff harmed only by the foreign effect of a global scheme had no U.S. remedy. *See Kruman*, 284 F.3d at 403 (citing *Pfizer*, 434 U.S. at 313-15). Judge Patrick Higginbotham's dissent in *Den Norske* similarly emphasized that allowing foreign plaintiffs to sue would protect U.S. consumers by deterring perpetrators from engaging in global conspiracies that harm U.S. markets. *See Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting). Judge Higginbotham, following *Pfizer*, reasoned that a global

price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations. "Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred." *Id.*

We find this deterrence reasoning, drawn from *Pfizer*, and amplified in Judge Higginbotham's opinion in *Den Norske*, most compelling. The less restrictive interpretation of the "gives rise to a claim" language of FTAIA, allowing suits by foreign plaintiffs injured by the foreign effects of a global conspiracy, serves "the United States' narrow interest in vigorous domestic competition" better than the restrictive interpretation disallowing such suits. *Id.* at 438-39. *Pfizer*'s concern was that denying a foreign plaintiff injured by an antitrust violation a remedy under our antitrust laws would permit a price fixer to escape full liability for his conduct, which would lessen the deterrent effect of the antitrust laws. This concern applies squarely to this case. Disallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce. Suits only by those injured by the U.S. effects of a conspiracy may not provide sufficient deterrence; a conspirator could expect that illegal profits abroad would offset his liability in the U.S., leaving the conspirator with an incentive to engage in global conspiracy. Allowing suits by those injured solely in foreign commerce, where the anticompetitive conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct.

Even assuming, *arguendo,* that the antitrust laws are only intended to protect selfish national interests, suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies. This reasoning is also supported by FTAIA's legislative

history, which notes: "As the Supreme Court pointed out in *Pfizer*, ... to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. REP. NO. 97-686, at 10.

We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be underdeterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability. In any case, the profitability of the global conspiracy would depend on the uncertainties of foreign antitrust enforcement. The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy. We think that *Pfizer* supports this view and that the citation to *Pfizer* in the legislative history of FTAIA suggests that Congress meant to endorse it as well.

6. Conclusion on Subject Matter Jurisdiction

On the basis of the foregoing, we conclude that the less restrictive view of FTAIA's jurisdictional reach, allowing subject matter jurisdiction in this case, is what Congress meant to achieve. The District Court erred in dismissing the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, since under the less restrictive interpretation, the foreign plaintiffs can establish that the global conspiracy's "direct, substantial, and reasonably foreseeable effect" on domestic commerce "gives rise to a claim" under the antitrust laws.

B. Standing

Appellees contend that, even if subject matter jurisdiction is proper, the case should nonetheless be dismissed because the foreign purchasers lack standing. Because the District Court concluded that it lacked subject matter jurisdiction over the foreign plaintiffs' claims, it declined to address the standing issue. Although the District Court did not rule on the issue, it was fully presented below, as well as before this court. Appellants ask this court to remand the case so that the District Court may examine the issue in the first instance, or alternatively, to find that they have standing.

While the District Court's failure to rule on the issue of standing "might be thought to warrant a remand, so that the district court [may] consider the matter in the first instance, the Supreme Court has instructed the courts of appeals to decide for themselves whether the party seeking judicial review has standing, even if the issue was not decided below...." *Found. on Econ. Trends* v. *Lyng*, 943 F.2d 79, 82 (D.C. Cir. 1991) (citing *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990)). We are thus "required to address the issue [of standing] even if the courts below have not passed on it...." *FW/PBS*, 493 U.S. at 230 (citing *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969)). "Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'...." *FW/PBS*, 493 U.S. at 231 (citing *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934))).

To meet the constitutional requirements of standing under the Clayton Act, an antitrust plaintiff must establish "injury-in-fact or threatened injury-in-fact caused by the defendant's alleged wrongdoing." *Andrx Pharms., Inc.* v. *Biovail Corp. Int'l*, 256 F.3d 799, 806 (D.C. Cir. 2001) (citing *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983)). The foreign purchasers have constitutional standing. They allege that they

suffered injury-in-fact when they paid inflated prices for vitamins directly to the defendants. This injury was allegedly caused by defendants' conspiracy to fix vitamin prices around the world. There is no dispute that the foreign plaintiffs in this case have been injured by paying inflated prices for vitamins.

In addition, an antitrust plaintiff must establish "antitrust injury," that is, "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Appellees argue that the plaintiffs' injuries "are not 'injury of the type the antitrust laws were intended to prevent,' because those laws do not forbid the fixing of prices in the markets in which Plaintiffs purchased vitamins, but only in U.S. commerce." Appellees' Br. 42 (citation omitted). We disagree.

In this case, plaintiffs allege that the defendants engaged in a global conspiracy that had an effect on U.S. and foreign commerce. The antitrust laws do not merely forbid price-fixing in U.S. commerce, but rather forbid price-fixing that harms U.S. commerce. See, *e.g.*, *Laker Airways*, 731 F.2d at 922 ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."); *Alcoa*, 148 F.2d at 443-44; *cf. Pfizer*, 434 U.S. at 314 ("The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations."). Thus, the antitrust laws forbid the fixing of prices in foreign markets where that conduct harms U.S. commerce. Where defendants' global conspiracy harms U.S. commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue.

In *Brunswick*, the Supreme Court explained that, to establish "antitrust injury," the injury should be "'the type of loss that the claimed violations'" of the Sherman Act "'would be likely to cause.'" *Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100, 125 (1969)). The foreign purchasers of vitamins here were injured by conduct that violated the Sherman Act – a global price-fixing conspiracy. The foreign plaintiffs' paying of inflated prices in foreign commerce was loss of the type that violation of the Sherman Act would be likely to cause. Moreover, the arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here. The foreign purchasers' injury therefore must be deemed to be "of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's conduct unlawful." *Brunswick*, 429 U.S. at 489. Appellants can therefore establish "antitrust injury."

In addition, we must consider the following additional *Associated General Contractors* factors to determine whether appellants are "proper plaintiffs": "the directness of the injury, whether the claim for damages is 'speculative,' the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages." *Andrx Pharms.*, 256 F.3d at 806 (citing *Associated Gen. Contractors*, 459 U.S. at 542-45). The foreign plaintiffs allegedly purchased vitamins at inflated prices directly from the defendants, and their injury arose from defendants' alleged conspiracy to inflate prices. The injury is direct and the claim for damages is not speculative. Allowing the foreign plaintiffs to sue does not risk duplicative recovery or complex damage apportionment.

Appellees finally argue that "there is a large body of 'more appropriate plaintiffs,'" namely the "hundreds of U.S.

plaintiffs, as well as a class of domestic purchasers," who have sued the defendants. Appellees' Br. 44. But these domestic plaintiffs have not been harmed more directly by the foreign effects of the conspiracy than the foreign purchasers, and appellees do not suggest that the domestic plaintiffs can seek to recover for the same injury that the foreign plaintiffs suffered. The domestic plaintiffs are not more direct victims of defendants' conduct than the foreign plaintiffs, since the foreign plaintiffs have been injured just as directly as the domestic plaintiffs as a result of the defendants' conduct. Furthermore, for the reasons already explained, the foreign plaintiffs play an important role in the deterrence of the global conspiracy, a role that cannot be filled adequately by the domestic plaintiffs alone. Therefore, the foreign plaintiffs are proper plaintiffs to bring suit in this case.

We conclude that the foreign plaintiffs in this case have standing to bring their federal antitrust claims.

C. Supplemental Jurisdiction

Appellants contend that, after the District Court dismissed the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, it erred in declining to exercise supplemental jurisdiction over the foreign plaintiffs' foreign law claims pursuant to 28 U.S.C. § 1367. Appellants argue that "the district court has original subject matter jurisdiction over the claims of the domestic plaintiffs under the Sherman Act, and consequently, should have exercised supplemental jurisdiction over the claims of the foreign plaintiffs." Appellants' Br. 27-28.

This court reviews the District Court's decision not to exercise supplemental jurisdiction for abuse of discretion. *See Diven* v. *Amalgamated Transit Union Int'l & Local 689*, 38 F.3d 598, 601 (D.C. Cir. 1994). 28 U.S.C. § 1367 provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction

that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367. Under 28 U.S.C. § 1367, "the District Court has supplemental jurisdiction over related claims when it has original jurisdiction over the initial claim." *Harris* v. *Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 346 (D.C. Cir. 1997). "When the District Court has dismissed claims properly before it, it retains discretion to decide whether or not to dismiss other claims as to which it may exercise supplemental jurisdiction." *Id.* The District Court "may decline to exercise supplemental jurisdiction over a claim" if, for example, "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). But "if the district court dismissed the underlying claim on jurisdictional grounds, then it could not exercise supplemental jurisdiction. "*Saksenasingh* v. *Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997).

When the District Court dismissed the foreign plaintiffs' underlying federal antitrust claim on jurisdictional grounds, it had no discretion to exercise supplemental jurisdiction at all over the foreign plaintiffs' foreign law claims. Appellants' assumption that the District Court's remaining jurisdiction over the *domestic* plaintiffs' claims can serve as the basis of supplemental jurisdiction over the foreign plaintiffs' foreign law claims is implausible, and appellants cite no cases to support this assumption. When the District Court dismissed the foreign plaintiffs' claims on jurisdictional grounds, the remaining original jurisdiction over the domestic plaintiffs' claims was irrelevant to the exercise of supplemental jurisdiction over the foreign plaintiffs' foreign law claims. The dismissal of the foreign plaintiffs' federal antitrust claims on jurisdictional grounds precluded the District Court from exercising supplemental jurisdiction over any of the foreign plaintiffs' additional claims over which the court did not have original jurisdiction.

We recognize that the District Court has already articulated reasons that counsel against exercising supplemental jurisdiction, such as comity, efficiency, and the

novelty and complexity of the issues of foreign law involved. The posture of the case has now changed, however, because we reverse the District Court's decision on subject matter jurisdiction and vacate its judgment against appellants. On remand, the District Court will have original jurisdiction over the foreign plaintiffs' federal antitrust claims. Therefore, the District Court must consider anew whether to exercise its discretion to accept supplemental jurisdiction over the foreign plaintiffs' foreign law claims. But the District Court still retains discretion to decline to exercise supplemental jurisdiction over the foreign law claims pursuant to 28 U.S.C. § 1367.

III. CONCLUSION

For the reasons stated above, we reverse the District Court's decision, vacate the judgment against appellants, and remand the case for further proceedings consistent with this opinion.

DISSENT

KAREN LECRAFT HENDERSON, Circuit Judge, dissenting:

I disagree with the majority's interpretation of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, and, consequently, with its disposition of this appeal.[1] The majority decides whether a court has jurisdiction over claims asserted by a plaintiff in one action by reference to a hypothetical claim another party could, perhaps, raise in some other proceeding. This seems a peculiar notion. The more natural reading of the statutory language, I believe, is the narrower one adopted by the district court below and by the Fifth Circuit in *Den Norske Stats Oljeselskap AS* v. *HeereMac VOF*, 241 F.3d 420 (5th Cir. 2001), under which the phrase

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[1] I nonetheless agree with the majority's determination that the district court lacked discretion to exercise supplemental jurisdiction once it had dismissed all of the appellants' claims under United States law. *See* maj. op. at 34-36.

"gives rise to a claim" refers to the claim advanced by the plaintiff in the action before the court. This reading, to me, reflects the Congress's "unambiguously expressed intent" under *Chevron USA Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). It is also consistent with the legislative history that the majority cites.

The Fifth Circuit's narrower construction is unambiguously supported by the House Report's declaration that "the 'effect' providing the jurisdictional nexus must also be the basis *for the injury alleged* under the antitrust laws." H.R. Rep. 97-686, at 11-12 (emphasis added); *see* maj. op. at 23-24. The plain meaning of this statement is not undercut, as the majority contends, by the two sentences that follow; they simply explain that, so long as "the basis of the claim has had the requisite impact on the domestic or import commerce of the United States,"[2] the claim does not fail simply because "the impact of the illegal conduct" is not "experienced by the injured party within the United States." H.R. Rep. No. 97-686, at 12; *see* maj. op. at 24. Another excerpt the majority quotes similarly explains that "foreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace, just as our citizens do" so long as "the conduct has the requisite effects within the United States, even if some purchasers *take title* abroad or *suffer economic injury* abroad." *See* H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 27) (emphasis added). Taken together, these two excerpts make clear that neither the situs of the injury nor the nationality of the claimant is jurisdictionally dispositive so long as there is a sufficient domestic impact or effect to satisfy subsection (1) of the FTAIA. Neither excerpt purports to eliminate the requirement in subsection (2) that such domestic impact give rise to the claimed injury wherever and by whomever felt. Other of the majority's citations likewise relate to the first prong of the jurisdictional test, in subsection

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[2] Notably, the word "claim" in the quoted language refers to the specific claim asserted by the injured party.

(1), and so are of no assistance in construing the second prong of the test set out in subsection (2). *See* maj. op. at 24-26 (quoting H.R. Rep. No. 97-686, at 9-10, 11, 13). Finally, the Report expressly relies, as the majority observes, on the United States Supreme Court's decision in *Pfizer* v. *Government of India*, 434 U.S. 308 (1978), but only for the broad proposition that "to deny foreigners a recovery could *under some circumstances* so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 30) (emphasis added). The Report does not suggest the deterrence policy discussed in *Pfizer* justifies expanding jurisdiction beyond the limits expressed in subsection (2) of the FTAIA.

Finally, I believe that our decision in *Caribbean Broadcasting Sys., Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), cannot be construed to support the majority's interpretation of the FTAIA. As a textual matter, the court in *Caribbean* addressed only subsection (1) of the FTAIA, with nary a mention of subsection (2). Even were we to presume that the court *sub silentio* considered the second prong of the jurisdictional test, the plaintiffs' allegations plainly show that, notwithstanding the majority's contrary assertion, *see* maj. op. at 14, the alleged domestic effect did in fact give rise to the foreign plaintiff's anti-trust claim. In *Caribbean Broadcasting* the court found the foreign plaintiff had adequately alleged that (1) the defendants engaged in "anticompetitive conduct" – "namely, that the defendants made fraudulent misrepresentations to advertisers and sham objections to a government licensing agency in order to protect their monopoly" over FM radio advertising in "the market for English-language radio broadcast advertising in the Eastern Caribbean"; (2) "U.S. customers in the relevant market suffered antitrust injury, to wit, they paid excessive prices for advertising because of the unlawful actions of [the defendants]"; and (3) the foreign plaintiff "was and remains

foreclosed from selling advertising to many of those U.S. companies that had purchased advertising time from [the defendant radio broadcaster]." 148 F.3d at 1087. Thus it is clear that the defendants' fraudulent anticompetitive conduct had the effect of causing U.S. companies to advertise only with the defendants and that this effect gave rise to the foreign plaintiff's claim for lost customers.

In sum, because I believe that the plain language in subsection (2) of the FTAIA expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under subsection (1) of the statute, I respectfully dissent.

EMPAGRAN S.A., et al., Plaintiffs,

v.

F. HOFFMAN-LA ROCHE, LTD., et al., Defendants.

Civ. No. 00-1686 (TFH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

June 7, 2001, Decided
June 7, 2001, Filed

COUNSEL: For EMPAGRAN, S.A., NUTRICION ANIMAL, S.A., WINDDRIDGE PIG FARM, BRISBANE EXPORT CORPORATION PTY, LTD., plaintiffs: Paul T. Gallagher, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC.

For F. HOFFMAN-LAROCHE, LTD., HOFFMAN-LAROCHE, INC, RHONE-POULENC ANIMAL NUTRITION INC, BASF A.G., BASF CORPORATION, LONZA A.G., LONZA INC., CHINOOK GROUP LTD, CHINOOK GROUP INC, DCV, INC., DUCOA, L.P., EISAI CO., LTD., EISAI U.S.A., INC., DAIICHI PHARMACEUTICALS CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA VITAMIN & FOOD USA, INC., MERCK KGAA, E MERCK, DEGUSSA-HULS AG, DEGUSSA HULS CORPORATION, NEPERA INC, REILLY INDUSTRIES, INC., BIOPRODUCTS, INC., SUMITOMO CHEMICAL CO., LTD., LONZA A.G., TANABE SEIYAKU COMPANY LTD., COPE INVESTMENTS LTD, ALUSUISSE LONZA GROUP LTD, AKZO NOBEL CHEMICALS BV, UCB SA, REILLY CHEMICALS SA, MITSUI & CO., LTD., AVENTIS SA,

HOECHST MARION ROUSELL SA, defendants: Bruce L. Montgomery, ARNOLD & PORTER, Washington, DC.

JUDGES: Thomas F. Hogan, United States District Judge.

MEMORANDUM OPINION

Pending before the Court is the Joint Motion of Certain Defendants to Dismiss the Amended Class Action Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[1] Upon careful consideration of defendants' Joint Motion to Dismiss, plaintiffs' opposition, defendants' reply, the arguments presented at the May 23, 2001 hearing, the Sumitomo defendants' post-hearing submission, the Empagran plaintiffs' reply to the Sumitomo brief, and the entire record herein, this Court will grant the Joint Motion to Dismiss with respect to the foreign plaintiffs' federal antitrust claims and defer ruling on the Motion with respect to the domestic plaintiffs' federal antitrust claims pending the domestic plaintiffs' supplementation of their factual allegations with respect to the jurisdictional and

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[1] The Joint Motion to Dismiss was filed by defendants Hoffman-La Roche, Inc., Roche Vitamins, Inc., BASF Corporation, Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc, Inc., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corporation, Daiichi Fine Chemicals, Inc., Eisai USA, Inc., Eisai Inc., Akzo Nobel Chemicals B.V., Akzo Nobel Inc., Lonza Inc., Bioproducts Inc., Degussa-Huls Corporation, EM Industries, Inc., Mitsui & Co., Ltd., Nepera, Inc., Reilly Industries, Inc., Sumitomo Chemical America, Inc., Tanabe USA, Inc., and UCB Chemicals Corporation. This Motion has also been adopted by Chinook Group, Ltd., Cope Investments Ltd., DuCoa, L.P., DCV, Inc., UCB S.A., Eisai Co., Ltd., Hoechst Marion Roussel, S.A., Rhone-Poulenc S.A., Sumitomo Chemical Co., Ltd., Degussa AG, Merck KgaA, E. Merck, F. Hoffman-La Roche, Ltd., BASF Aktiengesellschaft, Lonza AG, Alsuisse Group Ltd., and Lonza Inc.

standing issues. In addition, the Court will grant defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Complaint.

I. BACKGROUND

Plaintiffs in this case represent foreign corporations domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and the Ukraine, as well as two United States corporations – The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. – headquartered in Ohio. Plaintiffs are seeking damages and injunctive relief under the antitrust laws of the United States, the antitrust laws of the relevant foreign nations, and international law for defendants' alleged conspiracy to fix prices, allocate market shares, and commit other unlawful practices "designed to inflate the prices of various vitamins sold to plaintiffs and other purchasers both within and outside the United States." Amend. Compl. at ¶ 1.

Plaintiffs propose to bring this action on behalf of themselves and as representatives of the following classes: (1) domestic purchasers, that is, "all persons or entities domiciled in the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 to February, 1999, for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators, and their respective subsidiaries and affiliates"; and (2) foreign purchasers, that is, "all persons and entities domiciled outside the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 through February, 1999, for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators and their respective subsidiaries and affiliates." *Id.* at ¶ 96.

II. DISCUSSION

In their Joint Motion to Dismiss, defendants make the following arguments for dismissal: (1) this Court lacks subject matter jurisdiction under the federal antitrust laws to

remedy plaintiffs' injuries, because the injuries they seek to redress were allegedly sustained in transactions that lack any direct connection to U.S. commerce; (2) plaintiffs lack standing under the federal antitrust laws to assert their claims because they seek to remedy injuries sustained outside United States commerce and thus fall outside the class of persons whom the Sherman Act is designed to protect; (3) the claims of the domestic plaintiffs are duplicative of claims previously asserted in another action pending in our Court in the Vitamins Antitrust Litigation and should thus be dismissed; and (4) the Court should decline to exercise supplemental jurisdiction over plaintiffs' foreign law claims and should dismiss plaintiffs' claims for violations of customary international law for failure to state a claim upon which relief may be granted.

A. Subject Matter Jurisdiction

Defendants argue that this Court lacks subject matter jurisdiction over plaintiffs' claims and plaintiffs have failed to state a claim under the federal antitrust laws, because plaintiffs have not alleged that their injuries were sustained in U.S. commerce as the direct, substantial, and reasonably foreseeable results of anti-competitive conduct by the defendants. Jt. Mot. at 4. Plaintiffs, on the other hand, contend that their allegations of a "global" conspiracy that operated domestically as well as internationally suffice to state a federal antitrust claim and establish this Court's jurisdiction over the Amended Complaint.

The critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws. The Sherman Act has been held to reach conduct abroad only if the conduct was intended to have, and did have, significant effects within the United States. *Kruman* v. *Christie's Internat'l PLC*, 129 F. Supp. 2d 620, 624 (S.D.N.Y. 2001); see also *Hartford Fire*

Ins. Co. v. *California*, 509 U.S. 764, 796 (1993) ("Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce"). In fact, in 1982, Congress enacted the Foreign Trade Antitrust Improvements Act ("FTAIA") for the purpose, among others, of "exempting from the United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities abroad." Id. The FTAIA provides in pertinent part that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial and reasonably foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations" and "such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section." 15 U.S.C. § 6(a). Therefore, under federal antitrust law, to establish subject matter jurisdiction over this action, plaintiffs must allege that the conduct causing their injuries resulted in a "direct, substantial, and reasonably foreseeable effect on U.S. commerce." *Kruman*, 129 F. Supp. 2d at 625. In addition, plaintiffs must also allege that the injuries they seek to remedy "arise" from an anticompetitive effect of defendants' conduct on U.S. commerce. *Id.* In other words, the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. *Id.* Given these standards, the Court would certainly have jurisdiction to provide redress for injuries suffered in consequence of overt acts in furtherance of the conspiracy, such as the imposition of fixed prices, that occurred in the United States, because those acts would both have occurred and have had effects here; but this Court would only have jurisdiction over

plaintiffs' alleged injuries, which were suffered in consequence of overt acts that occurred outside this country, if those acts, either individually or perhaps collectively had direct, substantial and reasonably foreseeable effects within the United States that caused the injuries seeking redress here. *Id.* 129 F. Supp. 2d at 625-26.

The problem here is that although plaintiffs generally allege that the defendants' price fixing behavior had direct, substantial, and reasonably foreseeable effects on U.S. commerce, see Amend. Compl. ¶¶ 1-4 (describing defendants' conspiratorial and price fixing actions both within the United States and abroad, including meetings and agreements among the defendants, many of which took place within the United States), they propose to bring this action only on behalf of domestic and foreign purchasers who directly purchased Class Vitamins from defendants or their co-conspirators "for delivery outside the United States." Plaintiffs have not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case. Plaintiffs argue that the jurisdictional nexus is provided solely by the global nature of the defendants' conduct. In plaintiffs' view, the territorial effect of that conduct is irrelevant. However, the existing caselaw does not support plaintiffs' position. See, e.g., *Kruman*, 129 F. Supp. 2d at 626-27 (dismissing complaint for lack of subject matter jurisdiction despite the fact that "meetings in which the conspiracy was formed or continued and acts in furtherance of the conspiracy occurred both in the United States and elsewhere," where conduct that allegedly injured plaintiffs "took place abroad"); *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) ("actionable aspect of anticompetitive restraint is not location of the alleged anticompetitive conduct, but an "anticompetitive effect on American commerce"); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis. 2000) (holding that plaintiff injured as a result of defendants' manipulation of the London Metal

Exchange could not rely on defendants' conduct in the United States to establish subject matter jurisdiction; "it is irrelevant that some of defendants' conduct took place in the United States. It was not the conduct in the United States that caused plaintiffs' injuries"); *McElderry* v. *Cathay Pac. Airways Ltd.*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988) ("An anticompetitive effect on United States commerce is required for jurisdictional nexus, regardless whether there was anticompetitive conduct in the United States"). Allegations of a worldwide conspiracy do not suffice under the applicable caselaw to establish the necessary direct, substantial and reasonably foreseeable effect on U.S. commerce required to establish this Court's jurisdiction. *See e.g.*, *Lantec, Inc.* v. *Novell*, 2000 U.S. Dist. LEXIS 19905, at *18, No. 2:95- CV-97-ST (D. Utah, Sep. 15, 2000) (rejecting contention by foreign plaintiffs that subject matter jurisdiction exists under the FTAIA when injuries suffered in foreign markets are "inextricably intertwined" with injuries inflicted on the domestic market," because plaintiffs failed to allege that defendants' "actions toward the [plaintiffs] had a substantial effect on the domestic market"); *Kruman*, 129 F. Supp. 2d at 625-26 (rejecting argument that transnational nature of auction market was sufficient to establish court's jurisdiction, because relevant conduct for purposes of measuring U.S. effects was not the "transnational price fixing conspiracy" but rather "the precise acts that caused injury," *i.e.* "the imposition of charge for auction services at levels determined or affected by the illicit agreement" and although "some of those acts occurred here . . . some – those of which plaintiffs in these cases complain – took place abroad"); *Den Norske Stats Oljeselskap AS* v. *HeereMac VOF*, 241 F.3d 420, 428 (5th Cir. 2001) (holding that court lacked subject matter jurisdiction over plaintiff's claim, despite the fact that plaintiff had alleged that the market allocation scheme had affected the price for heavy-lift barge services in the Gulf of Mexico, because the allegedly anticompetitive prices charged for heavy-lift barge services in the Gulf of Mexico did not

"give rise to" the plaintiff's claim, which was based on injuries sustained in purchasing heavy-barge services in the North Sea).

Plaintiffs argue that Congress intended only to limit recovery under the FTAIA to conduct that had some domestic effect and that it did not intend to limit the Court's jurisdiction to cases where plaintiffs' injuries involved those domestic effects. To support this assertion, plaintiffs contend that by using the word "unless" rather than "except to the extent that" when referring to the domestic effects requirement, Congress allowed the entire range of conduct with some domestic effect to be actionable, and did not limit courts to injuries tied to these effects.[2] However, plaintiffs cite no caselaw to support this argument and the caselaw cited by defendants strongly refutes this contention. Moreover, the Court is not convinced that "if" and "to the extent that" carry such a different meaning in the context of this statute. Plaintiffs' brief relies almost exclusively on these types of linguistic arguments, as well as several quotations from the dissents of cases cited by defendants.

In fact, plaintiffs acknowledged at the May 23, 2001 hearing that no court has ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case; however, plaintiffs contend that fairness necessitates that this Court expand the scope of the U.S. antitrust laws in order to compensate plaintiffs for defendants' acknowledged wrongdoing. While the Court understands that

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[2] Plaintiffs make a similar argument with respect to the legislative history of the FTAIA, which makes the Sherman Act applicable "if" the alleged restraints on export trade have a direct and substantial effect on U.S. commerce. Plaintiffs argue that if Congress had intended to make the FTAIA applicable only to particular injuries with these domestic effects, it would have said that jurisdiction exists "to the extent that" or "insofar as" the requisite U.S. effects are found, rather than "if" the requisite effects are found.

some, although not all, of these defendants have pled guilty to price fixing activities in violation of United States antitrust laws, the Court cannot expand the scope of the law in order to satisfy these fairness concerns. Plaintiffs may indeed have a remedy against these defendants abroad. However, the issue here is not whether these defendants are in fact guilty of the conduct alleged but whether this Court has jurisdiction over the plaintiffs' claims. Given the state of the law at the present time, the Court cannot find that it has jurisdiction over the foreign plaintiffs' federal antitrust allegations in this action. Therefore, the Joint Motion to Dismiss the foreign plaintiffs' claims brought under federal antitrust laws is granted for lack of subject matter jurisdiction.

However, the Court's ruling with respect to the claims of the foreign plaintiffs does not resolve the issue of whether this Court has jurisdiction over the allegations of The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co., the two domestic plaintiffs in this action. Subject matter jurisdiction may exist over the proposed domestic purchaser class' claims if they purchased the vitamins in interstate commerce, regardless of the fact that they planned to deliver these vitamins abroad. See *Carpet Group Internat'l* v. *Oriental Rug Importers Assoc.*, 227 F.3d 62, 75-76 (3d Cir. 2000) ("because the plaintiffs have introduced evidence sufficient to show that the challenged conduct actually occurred in interstate commerce, we conclude that subject matter jurisdiction exists over plaintiffs' Sherman Act claims"). It is unclear from the face of the Amended Complaint whether the purchases at issue with respect to the domestic plaintiffs were made within the United States or abroad. The Amended Complaint says that the Procter & Gamble Co. "suffered injury in the United States," see Amend. Compl. at ¶ 22, but no similar allegation is made with respect to The Procter & Gamble Manufacturing Co.; instead with respect to the latter United States company, the Amended Complaint merely states that P&G Manufacturing purchased vitamin B5 from certain defendants or their co-

conspirators "for use in foreign countries." *Id.* at ¶ 19. Therefore, the Court will require Procter & Gamble Co. and The Procter & Gamble Manufacturing Co. to supplement their Amended Complaint to provide more detailed factual allegations with respect to how defendants' conduct caused injuries to these two plaintiffs in United States commerce.

B. Standing

Defendants also contend that plaintiffs lack standing in this case, because they have not been injured in United States commerce and therefore fall outside the class of persons whom the Sherman Act is designed to protect. See Jt. Mem. at 19-20 (citing, among other cases, *The 'In' Porters S.A.* v. *Hanes Printables, Inc.* 663 F. Supp. 494, 499 (M.D.N.C. 1987) ("The concerns of the antitrust laws is the protection of American consumers and American exporters, not foreign consumers or producers")). By contrast, plaintiffs maintain that they have standing here because their alleged injuries occurred in a global market, which necessarily includes United States commerce. See Pl's Opp. at 19 (citing, among other cases, *Transnor (Bermuda) Ltd.* v. *BP North Am. Petroleum ("Transnor II")*, 738 F. Supp. 1472, 1476 (S.D.N.Y. 1990) (foreigners have standing to sue under the U.S. antitrust laws if the alleged course of anticompetitive conduct has the requisite impact on U.S. commerce")). Because this Court has concluded that it lacks subject matter jurisdiction over the foreign plaintiffs' claims, it need not resolve the standing issue with respect to these plaintiffs. However, because the Court conceivably may have subject matter jurisdiction over the two domestic plaintiffs' claims, it will address standing with respect to the domestic plaintiffs.

Generally, in order to determine whether a plaintiff has antitrust standing, courts consider the following factors: (1) the causal connection between an antitrust violation and the harm suffered by the plaintiff; (2) the directness of the asserted injury; (3) the risk of duplicative recoveries; (4) the existence of other, more appropriate, plaintiffs; and (5)

whether the antitrust laws were designed to provide redress for plaintiffs' injury. See *Associated Gen. Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 537-46 (1983). The fifth factor is especially important to an antitrust claim, because "a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990). For a plaintiff to have suffered an antitrust injury, the Court must determine that the plaintiff "was injured in the relevant market." *De Atucha* v. *Commodity Exch. Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985). For "purposes of standing, the relevant market must be the domestic market." *Galavan Supplements, Ltd.* v. *Archer Daniels Midland Co.*, 1997 U.S. Dist. LEXIS 18585, No. 97-3257, 1997 WL 732498, at *4 (N.D. Cal. Nov. 19, 1997); see also *Transnor II*, 738 F. Supp. at 1476 ("Only persons or corporations injured while trading in U.S. foreign or domestic commerce have standing" to bring Sherman Act claims). "Congress did not intend recovery under the antitrust laws by an individual who traded and was injured entirely outside of United States commerce." *Galavan*, 1997 U.S. Dist. LEXIS 18585, 1997 WL 732498, at *4 (quoting *De Atucha*, 608 F. Supp. at 518); see also *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 2001 U.S. Dist. LEXIS 305, 2001 WL 119908, at *13 (D. Md. Jan. 12, 2001) ("a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA").

In this case, plaintiffs allege generally that they have sustained injuries as a direct result of purchases and sales abroad during defendants' worldwide conspiracy to fix prices and exercise global market power over vitamins products. Despite the domestic plaintiffs' nationality, defendants contend that these plaintiffs lack standing because of the foreign nature of their transactions. See *Microsoft*, 127 F. Supp. 2d 702, 2001 U.S. Dist. LEXIS 305, 2001 WL 118908, at *13 ("The critical question is not the nationality of the

plaintiff but the location of the marketplace in which he participated"). The Amended Complaint does not provide sufficient detail with respect to the transactions involving the two United States plaintiffs, so it is unclear whether or not they were competitors or consumers in the U.S. domestic market.[3] Again, the issue is whether these plaintiffs have traded and were injured within or entirely outside of United States commerce. See *De Atucha*, 608 F. Supp. at 518 ("Congress did not intend recovery under the antitrust laws by an individual who traded, and was injured entirely outside of United States commerce"). The Court cannot resolve the standing issue with respect to the domestic plaintiffs until it receives their submissions further detailing where their alleged injuries occurred. Therefore, the Court will reserve decision on standing with respect to Procter & Gamble Co. and The Procter & Gamble Manufacturing Co. pending the additions to the Amended Complaint on this issue.

C. Duplicity of Domestic Plaintiffs' Claims

Defendants argue that the two domestic plaintiffs in this case, Procter & Gamble Co. and The Procter & Gamble Manufacturing Co., should be dismissed from this action because they are already parties to *The Procter & Gamble Co., et al.* v. *BASF Aktiengesellschaft, et al.*, a case originally filed in the Southern District of Ohio and subsequently transferred by the Multi-District Litigation Panel to, and currently pending before, this Court as part of the In re: Vitamins Antitrust Litigation. According to defendants, the Ohio lawsuit is premised on the same basic factual allegations as this action and similarly seeks damages in connection with

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[3] The Amended Complaint does state that P&G suffered injury in the United States; however, there is no similar allegation made with respect to the other United States corporation, P&G Manufacturing. Moreover, the allegations with respect to even the former plaintiff are too general and conclusory and require additional detail before this Court can resolve the standing question.

vitamins purchased for delivery abroad. Therefore, defendants reason, the Court should follow the "first-to-file" rule and dismiss the two domestic plaintiffs' claims in this action as duplicative. *See e.g., Washington Area Transit Auth.* v. *Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) (affirming dismissal of duplicative action and noting that "for more than three decades the rule in this circuit has been that, 'where two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is allowed to proceed to its conclusion first. . . .") However, plaintiffs contend that the claims in this case are not identical to those asserted in the Ohio suit; in fact, according to plaintiffs, the Ohio lawsuit pertains only to domestic sales, while this action deals exclusively with foreign commerce. See Pl's Opp. At 36 ("The amended complaint in P&G v. BASF references international activities and sales by way of background, but it does not purport to assert claims based upon sales of vitamins for delivery overseas").

After reviewing the allegations in the Ohio lawsuit and the instant action, the Court finds that plaintiffs are correct that dismissal would not be appropriate on duplicity grounds because plaintiff is not asserting the same claims in two separate actions. See P&G v. BASF First Amended Compl. (Def's Exh. A). In addition, plaintiffs are also correct that the first-to-file rule would not apply here because the claims are pending in two cases in this court rather than in two different courts[4]; therefore, to the extent that the claims could be found

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[4] Although the case was originally transferred to this Court only for pretrial proceedings, the parties to that case have subsequently entered into a stipulation that dictates that the case will be "treated for all purposes as if it has been transferred to the D.C. Court pursuant to 28 U.S.C. § 1404(a) and shall not be remanded for trial. . . ." 1/26/01 Stip. and Ord. Re: Personal Jurisdiction and Refiling of Actions P 2. However, according to defendants, the Stipulation does not involve all defendants so the

to belong in one action, consolidation rather than dismissal would be the appropriate result. See *Miller Brewing Co.* v. *Meal Co.; Ltd.*, 177 F.R.D. 642, 644-45 (E.D. Wis. 1998) (holding that "when both cases are pending in the same district – let alone the same judge – consolidation is preferable"); *Walton* v. *Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) ("When a court learns that two possibly duplicative actions are pending on its docket, consolidation may well be the most administratively efficient procedure. If the second complaint proves to contain some new matters, consolidation – unlike dismissal of the second complaint without prejudice or staying the second action – will avoid two trials on closely related matters"). The Court will reserve decision on the issue of consolidation pending the Court's rulings on subject matter jurisdiction and standing with regard to these domestic plaintiffs.[5]

D. Plaintiffs' Claims Under Foreign and Customary International Law

Defendants argue that even if this Court concludes that it has original jurisdiction over any of plaintiffs' claims, it nevertheless should decline to exercise supplemental jurisdiction over plaintiffs' claims under the "competition laws of the relevant foreign nations." Jt. Mot. at 27. Accordingly, defendants contend that Count Two should be dismissed. Additionally, defendants contend that Count Three should be dismissed because plaintiffs' claims for violations of customary international law do not state a claim upon which relief can be granted.

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domestic P&G plaintiffs' claims may not be so easily consolidated with this action.

[5] Since the Court is dismissing the claims brought by the foreign plaintiffs, it may be more practical for the domestic plaintiffs to consolidate their claims into the Ohio action currently pending before the Court; should the parties agree to consolidation, they should notify the Court as soon as possible.

On the other hand, plaintiffs contend that this Court has original subject matter jurisdiction over the claims of the domestic plaintiffs under the Sherman Act and consequently this Court may exercise supplemental jurisdiction over the claims of the foreign plaintiffs. Moreover, plaintiffs claim that the Alien Tort Claims Act, 28 U.S.C. § 1350, permits a foreign plaintiff to bring an action in a United States federal court for torts in violation of international law.

1. Foreign Law Claims

Title 28 of the United States Code, section 1367, grants district courts jurisdiction to hear claims within the "same case or controversy." 28 U.S.C. § 1367. The standard for supplemental jurisdiction is whether the claims "derive from a common nucleus of operative fact." *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966). The scope of supplemental jurisdiction has been applied to domestic and foreign claims in addition to state and federal claims. See, e.g., *Ortman* v. *Stanray Corp.*, 371 F.2d 154 (7th Cir. 1967) (holding that doctrine of ancillary jurisdiction applied to determine if district court had jurisdiction to hear claims of foreign patent infringement where court had undisputed jurisdiction to hear claim of U.S. patent infringement arising out of same activities).

However, 28 U.S.C. § 1367(c) enumerates several bases for declining to exercise supplemental jurisdiction: (1) the claim raises a novel or complex issue of law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c)(1)-(4).

Plaintiffs contend that this Court should exercise supplemental jurisdiction over these foreign law claims in order to reduce the inefficiency and redundancy that will occur if the foreign plaintiffs are forced to litigate identical

claims and issues in numerous courts around the world. Pl's Opp. at 34. However, both parties appear to agree that there are already a number of lawsuits pending "in numerous jurisdictions around the world," see Pl's Opp. at 34 (quoting Motion of Certain Defendants for a Protective Order Concerning Plaintiffs' Requests for Merits Discovery). Therefore, it is unclear how this action would reduce the number of suits or increase efficiency. This Court would certainly lack the power to order that the other actions be dismissed or consolidated; and, given the first-to-file rule, it would seem that this action should be dismissed as duplicative of the other actions since it was presumably filed after these actions. In any case, it would be more efficient and in the best interests of comity to allow the foreign courts to adjudicate the claims arising out of alleged violations of their own laws. Since these foreign law claims raise novel and complex issues of foreign law, the court has already dismissed all federal claims brought by the foreign plaintiffs for lack of subject matter jurisdiction, and there are comity and efficiency reasons for declining to exercise supplemental jurisdiction over the foreign law claims in this case, the Court will decline to exercise supplemental jurisdiction over plaintiffs' foreign law claims. See, *Microsoft*, 127 F. Supp. 2d 702, 2001 U.S. Dist. LEXIS 305, 2001 WL 118908, at *11 n.8 (declining to exercise any supplemental jurisdiction over foreign law claims). Accordingly, defendants' Joint Motion to dismiss Count Two of the Amended Complaint is granted.

2. Plaintiffs' Claims for Violations of Customary International Law

Defendants also argue for dismissal of the foreign plaintiffs' claims brought undercustomary international law for failure to state a claim upon which relief may be granted. In order to establish a right to recover damages for violations of customary international law, plaintiffs must show: (1) that there exists a customary international law proscribing the conduct of which they complain and (2) that the law applies to private citizens and not only to state action.

Customary international law is based primarily on "customs and usages of civilized nations, treaties, and other interstate agreements, the decisions of international tribunals, and the decisions of national tribunals." 48 C.J.S. International Law § 5; see also Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987). While plaintiffs are correct that the "'law of nations' is not stagnant and should be construed as it exists today among the nations of the world." Pl's Opp. at 26 (quoting *Tel-Oren* v. *Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774 (D.C. Cir. 1984), courts have held as recently as this year that "no antitrust claim based on customary international law has been recognized by a U.S. court." *Microsoft*, 127 F. Supp. 2d at 717 ("It is true that competition policy has been widely discussed on a global level. However, the international agreements regarding antitrust law that the foreign plaintiffs identify are voluntary and lack enforcement mechanisms. The dearth of enforceable international antitrust law highlights the inability of the international community to reach a consensus on competition policy. . . .Without general agreement on standards of international antitrust law, there can be no customary international law of antitrust. Therefore, plaintiffs' claim under customary international law fails"), see also *Kruman*, 129 F. Supp. 2d at 627 (rejecting a similar claim and noting that "plaintiffs' position, which only recently was rejected in the Microsoft case borders on the frivolous. . . . There is no substantial support for the proposition that there is an international consensus proscribing price fixing that fairly might be characterized as customary international law, much less an international consensus that price fixing gives rise to a tort claim on behalf of victims").

Plaintiffs cite no caselaw establishing a customary international law of antitrust.[6] Given the absence of any

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[6] Plaintiffs may be correct that the future of global antitrust policy could be in favor of a customary international law proscribing the type of conduct alleged here; certainly, there is

authority establishing such a cause of action, the Court cannot find that there exists a customary international law proscribing the conduct of which plaintiffs complain in this action. Therefore, it is unnecessary for the Court to reach the issue of whether the law requires state action. Accordingly, Count Three of the Amended Complaint should be dismissed for failure to state a claim upon which relief may be granted.

III. CONCLUSION

For the foregoing reasons, defendants' Joint Motion to Dismiss the federal antitrust claims in the Amended Class Action Complaint brought by the foreign plaintiffs is granted. In addition, The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. will supplement their federal antitrust allegations in the Amended Complaint to provide further detail on the location of the domestic plaintiffs' injuries and the effect of the defendants' conduct, which caused these injuries, on United States commerce.[7] The Court will reserve ruling on the jurisdictional, standing, and consolidation questions with respect to the domestic plaintiffs' federal antitrust claims pending the filing of these more detailed allegations. In addition, the Court will grant defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Class Action Complaint. An order will accompany this Opinion.

June 7th, 2001

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some evidence that such an international consensus may be needed in today's world of global economies. However, the law has not yet evolved to this point. A single United States district court cannot enact such an international agreement where none exists. Therefore, although plaintiffs may have predicted the future of the law, they have not stated a cause of action under present international law.

[7] If either domestic plaintiff finds that it cannot allege the necessary facts to establish subject matter jurisdiction and standing in accordance with the Court's legal rulings in this Opinion, that plaintiff should file the appropriate dismissal documents with the Court.

Thomas F. Hogan
United States District Judge

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' Joint Motion to Dismiss the federal antitrust claims brought by the foreign plaintiffs is **GRANTED**. It is further hereby

ORDERED that, within fifteen days of this Order, The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. either supplement their federal antitrust allegations in the Amended Complaint to provide further detail on the location of the domestic plaintiffs' injuries and the effect of the defendants' conduct, which caused these injuries, on United States commerce or file written stipulations of dismissal. It is further hereby

ORDERED that the Court will reserve ruling on the jurisdictional, standing, and consolidation questions with respect to the domestic plaintiffs' federal antitrust claims pending the filing of these more detailed allegations. And it is further hereby

ORDERED that defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Class Action Complaint is **GRANTED**.

June 7th, 2001
Thomas F. Hogan
United States District Judge

2

No. 05-541

IN THE

Supreme Court of the United States

EMPAGRAN, S.A., *et al.*,
Petitioners,

v.

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHONE-POULENC ANIMAL NUTRITION INC., RHONE-POULENC INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

This Court previously held in this case that petitioners, four foreign entities that purchased goods outside the United States from foreign sellers, could not assert claims under the Sherman Act unless an anticompetitive effect on U.S. commerce gave rise to their injuries. The Court remanded the case to the court of appeals to consider petitioners' argument that their injuries, although incurred in foreign countries in transactions with foreign sellers, actually arose from an effect on U.S. commerce. On remand, petitioners conceded that only foreign injuries proximately caused by an effect on U.S. commerce may give rise to a claim under the Sherman Act, and the court of appeals, applying that standard, unanimously affirmed the dismissal of petitioners' claims.

The question presented is:

Whether petitioners' allegation that respondents fixed prices in the United States in order to maintain fixed prices in the foreign countries where petitioners purchased their goods is sufficient to show that an effect on U.S. commerce proximately caused petitioners' foreign injuries.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

F. Hoffmann-La Roche Ltd is a corporation engaged in the manufacture of pharmaceuticals, diagnostic products and bulk vitamins. F. Hoffmann-La Roche Ltd is a wholly-owned subsidiary of Roche Holdings Ltd. Novartis AG, a publicly-held company, owns approximately 32.7% of the voting shares of Roche Holdings Ltd. Novartis AG has no representation on Roche Holdings Ltd's board of directors and does not in any way control Roche Holdings Ltd or any of its subsidiaries. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in F. Hoffmann-La Roche Ltd.

Hoffmann-La Roche Inc. ("HLRI"), a corporation engaged in the manufacture and sale of pharmaceuticals, and Roche Vitamins Inc. ("RVI") are indirect subsidiaries of Roche Holdings Ltd. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in HLRI or RVI.

BASF Aktiengesellschaft ("BASF AG") is a foreign corporation engaged in the production of numerous chemical products including bulk vitamins and is headquartered in Ludwigshafen, Germany. No publicly-held company has notified BASF AG under German Securities Laws that it has a 10% or greater ownership interest in BASF AG.

BASF Corporation is a corporation engaged in the sale of certain vitamin and vitamin-containing products and is an indirect subsidiary of BASF AG. Apart from BASF AG, there is no publicly-held company with a 10% or greater ownership interest in BASF Corporation.

Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.) and Hoechst Marion Roussel SA are corporations engaged in the life sciences business, specif-

ically in the manufacture and/or sale of pharmaceutical and nutritional products. Aventis Animal Nutrition Inc. is a wholly-owned indirect subsidiary of sanofi-aventis, a publicly traded company, which is the successor by merger to Aventis, f/k/a Rhône-Poulenc S.A. ("RPSA"). Hoechst Marion Roussel SA is a wholly-owned indirect subsidiary of Hoechst A.G. Sanofi-aventis owns substantially all of the outstanding shares of Hoechst A.G. Apart from sanofi-aventis, there is no publicly-held company with a 10% or greater ownership interest in Aventis Animal Nutrition Inc., Aventis CropScience USA Inc. or Hoechst Marion Roussel SA. Aventis CropScience USA, Inc. was sold by Aventis, Inc. and is now known as Bayer CropScience, Inc. and is no longer owned by sanofi-aventis. Sanofi-aventis, however, has retained the rights and liabilities of Aventis CropScience as they pertain to this litigation.

Takeda Pharmaceutical Company Limited (f/k/a Takeda Chemical Industries, Ltd.) ("TPC") is a corporation engaged, among other things, in the manufacture of certain vitamins. There is no publicly-held company with a 10% or greater ownership interest in TPC.

Takeda Vitamin & Food USA, Inc. ("TVFU") was a corporation engaged in the manufacture and distribution of certain vitamins and was a wholly-owned subsidiary of Takeda America, Inc., now known as Takeda America Holdings, Inc., which in turn is a subsidiary of TPC. TVFU was merged into BASF Corporation as of approximately January 2001.

Daiichi Pharmaceutical Co., Ltd. is a corporation engaged in the manufacture and sale of pharmaceutical products and certain vitamin products. It is the direct parent of Daiichi Pharma Holdings, Inc. (f/k/a Daiichi Pharmaceutical Corporation) and the indirect parent of Daiichi Fine Chemicals, Inc. On September 28, 2005, Daiichi Pharmaceutical Co., Ltd. became a wholly-owned subsidiary of Daiichi Sankyo Com-

pany, Limited, which is publicly traded on the Tokyo, Osaka and Nagoya stock exchanges in Japan.

Daiichi Pharma Holdings, Inc. (f/k/a Daiichi Pharmaceutical Corporation) is a corporation engaged in the clinical development and sale of pharmaceuticals and is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Pharma Holdings, Inc. has no outstanding securities in the hands of the public. Daiichi Pharmaceutical Corporation was prior to October 2002 the parent of Daiichi Fine Chemicals, Inc.

Daiichi Fine Chemicals, Inc. is a corporation engaged in sales and intermediary services for fine chemicals and related products and was prior to October 2002 a direct subsidiary of Daiichi Pharmaceutical Corporation, which in turn was a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Fine Chemicals, Inc. has no outstanding securities in the hands of the public.

Eisai Co., Ltd. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. There is no publicly-held company with a 10% or greater ownership interest in Eisai Co., Ltd. Eisai Co., Ltd. is the indirect parent of Eisai Inc. and Eisai U.S.A., Inc.

Eisai U.S.A., Inc. is a corporation that was engaged in the production and sale of bulk vitamin and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Eisai Inc. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Akzo Nobel Chemicals B.V. is a corporation engaged in the manufacture and sale of chemicals and is an indirect, wholly-owned subsidiary of Akzo Nobel N.V. Akzo Nobel Inc. is a holding company which does not manufacture or sell any product and is a direct, wholly-owned subsidiary of Akzo Nobel N.V. Apart from Akzo Nobel N.V., there is no

publicly-held company with a 10% or greater ownership interest in Akzo Nobel Chemicals B.V. or Akzo Nobel Inc.

Bioproducts Incorporated is a Delaware corporation formerly engaged in the business of manufacturing animal grade choline chloride and is a subsidiary of Mitsui & Co. (U.S.A.), Inc. Mitsui & Co., Ltd., a publicly-held company, owns a 20% interest in Bioproducts Incorporated.

Chinook Group Limited, now doing business as Chinook Global Limited, is a corporation organized and existing under the laws of Ontario, Canada and is a wholly-owned subsidiary of Cope Investments Limited. Chinook Group Limited, through its affiliates, is engaged in the manufacturing and selling of animal-grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in Chinook Group Limited.

Cope Investments Limited is a corporation organized and existing under the laws of Ontario, Canada. As a holding company, it does not manufacture or sell any product. There is no publicly-held company with a 10% or greater ownership interest in Cope Investments Limited.

Degussa AG (f/k/a Degussa-Hüls AG) is a corporation engaged in the manufacture of specialty chemicals and is headquartered in Dusseldorf, Germany. Two publicly-held German corporations, E.On AG and RAG AG, indirectly own more than 90% of Degussa AG's stock. There is no other publicly-held company with a 10% or greater ownership interest in Degussa AG.

Degussa Corporation (f/k/a Degussa-Hüls Corporation) is a corporation engaged in the manufacture of specialty chemicals and is a subsidiary of Degussa AG. Apart from Degussa AG, there is no publicly-held company with a 10% or greater ownership interest in Degussa Corporation.

DuCoa, L.P. is a Delaware limited partnership and formerly was engaged in the manufacture of animal grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in DuCoa, L.P.

DCV, Inc. is a Delaware corporation and is the general partner of DuCoa, L.P. DCV Holdings, Inc. is the parent company of DCV, Inc. Metropolitan Life Insurance has over a 10% interest in DCV, Inc.'s parent company.

E. Merck is a general partnership organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business.

Merck KGaA is a corporation with general partners limited by shares organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business. There is no publicly-held company with a 10% or greater ownership interest in Merck KGaA.

EM Industries, Inc., now known as EMD Chemicals Inc., is a New York corporation engaged in the specialty chemicals business. E. Merck and Merck KGaA together directly or indirectly own 100% of the shares of EM Industries, Inc.

Alusuisse-Lonza Group Ltd, a former affiliate of Lonza Inc. and Lonza AG, is a corporation with interests in various businesses including alumina and bauxite. It is now known as Alcan (Switzerland) Ltd and is a wholly-owned subsidiary of Alcan Inc.

Lonza AG is a business corporation engaged in several lines of business including the sale and manufacturing of niacin and niacinamide and is a direct, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza AG.

Lonza Inc. is a business corporation engaged in several lines of business including the sale of niacin and niacinamide.

Lonza Inc. is an indirect, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza Inc.

Mitsui & Co., Ltd. is a Japanese corporation engaged in business as a trading company. There is no publicly-held company with a 10% or greater ownership interest in Mitsui & Co., Ltd. and it has no parent company.

Nepera, Inc. is a corporation engaged in the manufacture, sale and distribution of specialty chemicals, including niacinamide. It is a wholly-owned subsidiary of Cambrex Corporation.

Reilly Industries, Inc. is an Indianapolis, Indiana-based corporation engaged in the business of manufacturing bulk chemicals. Reilly Industries, Inc. has no parent corporations and there is no publicly-held company with a 10% or greater ownership interest in Reilly Industries, Inc.

Reilly Chemicals, S.A. is a Belgian corporation engaged in the business of manufacturing bulk chemicals and is a subsidiary of Reilly Industries, Inc. There is no publicly-held company with a 10% or greater ownership interest in Reilly Chemicals, S.A.

Sumitomo Chemical Company, Ltd. is a Japanese publicly-traded corporation engaged in the manufacture, sale and distribution of chemicals, including biotin. There is no publicly-held company with a 10% or greater interest in Sumitomo Chemical Company, Ltd.

Sumitomo Chemical America, Inc. is a New York corporation engaged in the sale and distribution of certain chemical products in the United States, including biotin. It is a wholly-owned subsidiary of Sumitomo Chemical Company, Ltd.

Tanabe U.S.A., Inc. is a Delaware corporation that distributes and sells certain vitamins. Tanabe U.S.A., Inc. is an

indirectly owned subsidiary of Tanabe Seiyaku Co., Ltd. Apart from Tanabe Seiyaku Co., Ltd., there is no publicly-held company with a 10% or greater ownership interest in Tanabe U.S.A., Inc.

UCB Service Specialties, Inc., f/k/a UCB Chemicals Corporation, a corporation that did business in the specialty chemicals and flexible films industry, was wholly-owned by UCB, Inc. On March 29, 2005, UCB, Inc. sold its stock in Surface Specialties, Inc. to Cytec Industries, Inc. and the company was renamed Cytec Surface Specialties, Inc. UCB, Inc., however, retained any liability associated with this litigation. UCB, Inc. is wholly-owned by UCB S.A. UCB S.A., a corporation doing business in the pharmaceutical industry, is aware of one publicly traded company, Financiere d'Obourg S.A., that owns more than 10% of UCB S.A.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 05-541

EMPAGRAN, S.A., *et al.*,
Petitioners,

v.

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHONE-POULENC ANIMAL NUTRITION INC., RHONE-POULENC INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Petitioners advance no reason that would justify this Court's review of the court of appeals' decision. They do not claim that there is a conflict in the courts of appeals, nor do they identify any extraordinary circumstance that might justify review in the absence of such a conflict. The court of appeals' unanimous opinion faithfully followed this Court's precedents, in particular this Court's prior unanimous ruling in this case. The decision below correctly weighed considerations of comity and longstanding antitrust precedents in holding that the Sherman Act's limited extraterritorial scope does not

permit claims by foreign plaintiffs whose injuries are caused by anticompetitive conditions in foreign countries and do not directly arise from anticompetitive conditions in the United States.

Less than two years ago, this Court reviewed an earlier decision in this case to resolve a conflict in the courts of appeals as to a critically important question: whether the Sherman Act applies to price-fixing claims by foreign entities whose injuries did not arise from effects of the defendants' conduct on U.S. commerce but rather arose from effects on foreign countries. In *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004), this Court unanimously held that it did not. Pet. App. 28a. The Court determined that, under the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA"), 15 U.S.C. § 6a, Sherman Act claims based on conduct "involving trade or commerce * * * with foreign nations" can be asserted by foreign plaintiffs only if an effect on U.S. commerce "gives rise to" the foreign plaintiffs' claims.

The Court remanded the case for consideration of petitioners' alternative argument that a U.S. effect was a "but for" cause of their foreign injuries that thereby "gave rise to" them, even though those injuries were directly caused by higher prices charged in foreign countries by foreign sellers. Petitioners argued that the alleged cartel, in order to raise prices in the foreign countries where petitioners' purchases were made, necessarily had to raise prices in the United States, because lower U.S. prices would have driven down prices abroad. Hence, petitioners argued, an effect on U.S. commerce was a contributing cause of their injuries in foreign countries. On remand, however, petitioners conceded that the FTAIA's requirement that a U.S. effect "give[] rise to" the foreign injury imposes a proximate cause standard.

Applying that standard, the D.C. Circuit unanimously determined that higher U.S. prices were not the proximate cause of petitioners' injuries, which were proximately caused by

higher prices in the foreign countries where petitioners made their purchases. That ruling is entirely consistent with this Court's *Empagran* opinion, with the text and history of the FTAIA and with considerations of international comity, and it comports with the well-established principle that U.S. antitrust law does not regulate "the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). It also comports with the views of the United States, the Federal Trade Commission and the governments of our major trading partners. Those foreign governments appeared below and in the earlier proceedings before this Court to defend their sovereign interests in applying their domestic competition policies, including their approved remedies, to transactions occurring in their own countries. Finally, petitioners' concession before the D.C. Circuit that the FTAIA requires that a U.S. effect proximately caused their injuries makes this case a poor vehicle for review, because petitioners allege in substance only a "but for" relationship between U.S. prices and their foreign injuries. See *Empagran*, 542 U.S. at 175 (Pet. App. 45a).

1. In the late 1990s, the Department of Justice began investigating cartel activity among bulk vitamin producers. Several manufacturers and distributors of bulk vitamins subsequently pled guilty to criminal violations of the Sherman Act and paid approximately $900 million in fines. More than 75 private federal antitrust cases, including class actions, were filed, and virtually all have settled, for well more than $2 billion. In addition, more than 20 lawsuits filed by state attorneys general and more than 100 state law private actions have been settled for more than $400 million. Outside the United States, record civil penalties exceeding $1 billion were assessed against some respondents by Australia, Canada, the European Union and Korea, and investigations are ongoing in Brazil and Mexico. Private civil suits for damages have been filed in Australia, Belgium, Canada, France, Germany, the

Netherlands, New Zealand and the United Kingdom (including eight in the past year), including class actions in Australia and Canada.

Petitioners are four foreign companies located in Australia, Ecuador, Panama and Ukraine. They allegedly purchased vitamins in their local markets from foreign sellers in transactions outside U.S. domestic or export commerce. They neither purchased vitamins in the United States nor attempted to do so. Petitioners brought suit in 2000 in federal district court asserting claims under the Sherman Act. Their complaint alleges that bulk vitamins are commodities and that respondents engaged in concerted anticompetitive behavior in the "global market" for bulk vitamins. Compl. ¶ 89. Petitioners purport to represent a worldwide class of foreign entities that purchased vitamins outside the United States, although at least one of the petitioners, Windridge Pig Farm, is also a plaintiff in a class action in Australia.

2. The district court dismissed petitioners' claims, ruling that they fell outside the subject matter jurisdiction of the Sherman Act as amended by the FTAIA. The FTAIA provides in pertinent part that the Sherman Act "shall not apply to conduct involving trade or commerce * * * with foreign nations," unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic trade or commerce and "such effect gives rise to a [Sherman Act] claim." 15 U.S.C. § 6a. The district court held that the FTAIA required petitioners to show that a U.S. effect of respondents' conduct "gives rise to" their own claims, not just any claim. The court also held that petitioners could not satisfy this requirement merely by alleging the existence of a transnational vitamins market. Pet. App. 94a.

The court of appeals reversed in a divided panel ruling. The majority interpreted the FTAIA to permit plaintiffs whose injuries have no connection to U.S. commerce to assert Sherman Act claims so long as the alleged misconduct affected

U.S. commerce and that U.S. effect gave rise to a claim of "someone, even if not the foreign plaintiff who is before the court." Pet. App. 50a. The panel majority believed that imposing liability under U.S. law for purely foreign injuries would enhance deterrence of transnational cartels. Pet. App. 75a–78a.

The D.C. Circuit's divided panel ruling conflicted with an earlier ruling by the Fifth Circuit, which had interpreted the "gives rise to a claim" language of the FTAIA as requiring that the U.S. effect of the defendants' conduct give rise to the Sherman Act claim of the particular plaintiff before the court. *Den Norske Stats Oljeselkap AS v. HeereMac v.o.f.*, 241 F.3d 420, 427 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The Second Circuit too had issued an opinion that conflicted with the Fifth Circuit's decision. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

3. This Court granted certiorari to resolve the split among the courts of appeals. In a unanimous decision, it vacated the D.C. Circuit panel's decision, holding that the FTAIA requires plaintiffs to demonstrate that their own injuries arose from an effect on U.S. commerce. Two principles, this Court explained, dictated this conclusion.

First, the Court noted that Congress considers the legitimate sovereign interests of other nations when writing U.S. law, and that U.S. antitrust laws should accordingly be construed, absent a clear statement to the contrary, so as to avoid undue interference with others nations' sovereign prerogative to regulate their own economies. *Empagran*, 542 U.S. at 164 (Pet. App. 34a). The Court concluded that applying U.S. antitrust law to foreign conduct would be unreasonable when the plaintiffs' injuries were not caused by the effect of such conduct on U.S. commerce. *Id.* at 165 (Pet. App. 35a). These comity considerations also dictated that the FTAIA's jurisdictional test should be categorical and readily administrable,

because a fact-intensive inquiry into whether U.S. law conflicts with foreign policy in a particular case would "mean[] lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." *Id.* at 168–69 (Pet. App. 39a).

Second, the Court noted that the FTAIA's purpose had been "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce," *id.* at 169 (Pet. App. 39a) (emphasis in original), and that when the FTAIA was enacted, there was no meaningful precedent to suggest to Congress that the Sherman Act provides redress for injuries caused by effects on foreign rather than U.S. commerce, *id.* at 169–70 (Pet. App. 40a). Accordingly, the Court concluded that the statute should not be construed to provide recovery for injuries that arose from effects on foreign rather than U.S. commerce. *Id.* at 173 (Pet. App. 43a).

Having rejected the court of appeals' expansive construction of the FTAIA, the Court remanded the case for consideration of an alternative argument made by petitioners. Petitioners had also argued that their injuries did arise from an effect on U.S. commerce, because that effect, they asserted, was essential to maintaining inflated prices in the foreign countries where they purchased vitamins. Rather than reach this question in the first instance, the Court directed the D.C. Circuit to decide on remand whether "this 'but for' condition," *id.* at 175 (Pet. App. 45a), could satisfy the FTAIA's requirement that a U.S. effect "give[] rise to" the plaintiff's injury.

4. On remand, after full briefing and argument, the court of appeals unanimously determined that petitioners' injuries did not arise from an effect on U.S. commerce, because the "mere but-for" causal connection to U.S. commerce petitioners alleged was "simply not sufficient" to satisfy the statute.

Pet. App. 7a. The court determined that the FTAIA's requirement that a U.S. effect "give[] rise to" the plaintiff's injury restricts application of the Sherman Act to cases where a U.S. effect is the proximate cause of the plaintiff's injury, a proposition that the court noted petitioners had expressly conceded at argument. *Id.*[1] Against this standard, the court held that even if respondents had raised U.S. prices in order to keep prices high in the foreign countries where petitioners purchased vitamins, that mere "but-for" relationship between the U.S. effect (higher U.S. prices) and petitioners' injuries (payment of higher prices abroad) was too attenuated to satisfy the FTAIA. Pet. App. 7a.

The court of appeals closely followed the reasoning of this Court's *Empagran* opinion. The panel expressly recognized that ambiguous statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations." Pet. App. 7a (quoting *Empagran*, 542 U.S. at 164 (Pet. App. 34a)). With this touchstone, the court concluded that any standard short of a proximate cause relationship between the U.S. effect and the foreign injury "would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anticompetitive activity within their own borders." Pet. App. 7a.

The court agreed with the United States that the few precedents for applying the Sherman Act to foreign injuries were distinguishable. It noted that in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978), this Court had not examined the causal relationship between the U.S. effect and the plaintiff's injury (Pet. App. 5a), and that in the others, an effect on U.S. commerce was plainly the direct cause of the plaintiff's injury. Pet. App. 5a–6a (discussing *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, No. 75 Civ.

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[1] "As [petitioners] acknowledged at oral argument • • • 'but-for' causation between the domestic effects and the foreign injury claim is simply not sufficient." Pet. App. 6a.

5828-CSH, 1977-1 Trade Cas. (CCH) ¶61,256, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), and *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998)). Petitioners, by contrast, had failed to show "the kind of direct tie to U.S. commerce found in the cited cases." Pet. App. 7a. Their allegations stated "only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad." Pet. App. 8a. The direct cause, the court explained, was foreign prices: "[I]t was the foreign effects of price-fixing outside the United States that directly caused, or 'gave rise to,' their losses when [petitioners] purchased vitamins abroad at super-competitive prices." *Id.* The "mere but-for" connection petitioners alleged between the U.S. prices and the prices paid in foreign countries was, the court concluded, insufficient to satisfy the FTAIA. Pet. App. 7a.

5. The United States, the Federal Trade Commission and the various foreign governments that have participated in this case since it was previously before this Court all supported this conclusion. The Department of Justice argued that permitting petitioners to recover under U.S. law would impair antitrust enforcement efforts, because the threat of worldwide liability under U.S. law would discourage violators from disclosing misconduct under the Department's corporate leniency program. See, *e.g.*, Brief for the United States and the Federal Trade Commission ("U.S. Br.") at 20 ("Plaintiffs' theory threatens to upset the balance of incentives and disincentives that drives the amnesty program. * * * [T]he massive increase in potential civil liability [proposed by plaintiffs] would radically tilt the scale of incentives for conspirators against seeking amnesty."). The Department also warned of friction with foreign countries if the Sherman Act were applied to claims by persons whose injuries arose from the effects of anticompetitive conduct on foreign countries. See, *e.g.*, *id.* at 5 ("Opening U.S. courts to antitrust class actions from around the world also would interfere with the sovereign decisions of other nations about the appropriate remedies

to offer their consumers, their ability to regulate their commercial affairs, and their antitrust amnesty programs.").

For their part, the Governments of Canada, Germany, Japan, the Netherlands, Switzerland and the United Kingdom all defended their sovereign prerogative to regulate commercial affairs within their own countries and, in particular, to decide for themselves how injuries caused by the effects of anticompetitive conduct on their economies may be remedied.[2]

REASONS FOR DENYING THE PETITION

There is no reason for this Court to review the decision below. Less than two years ago, in a prior ruling in this case, the Court resolved a critically important conflict in the courts of appeals, holding that a foreign plaintiff cannot sue under the Sherman Act for injuries that do not arise from the U.S. effect of the defendants' conduct. Petitioners now seek review of the court of appeals' case-specific determination on remand that the injuries they allege did not arise from any U.S. effect. There is no conflict in the courts of appeals as to either that result or the reasoning behind it. Nor is there any tension between the decision below and this Court's precedents. To the contrary, the D.C. Circuit faithfully followed the reasoning of this Court's opinion in *Empagran*, and the result below is supported by principles of comity and longstanding antitrust precedent. There is, in short, no "unfinished business" for this Court to complete. The D.C. Circuit's ruling is consistent, moreover, with the views of the United States and the Federal Trade Commission and of every foreign nation that has participated in these proceedings, as well as the great weight of academic authority. Indeed, as the leading antitrust treatise has recognized, acceptance of petitioners' arguments would "undermine the en-

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[2] Respondents have requested permission to lodge with the Clerk of the Court, for the Court's convenience, copies of the briefs submitted below by the United States and the Federal Trade Commission and by foreign governments.

tirety of the Court's opinion [in *Empagran*], which unambiguously held that foreign plaintiffs injured by a conspiracy that also injured American purchasers could not sue under the Sherman Act." 1A P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 273a (2d ed. spec. supp. 2005).[3]

Finally, even if there were a significant question here, this case is not a proper vehicle to address it, as a result of petitioners' concession below that the FTAIA cannot be satisfied when U.S. effects are merely the "but for" cause of foreign injuries. See *supra* p. 7 & n.1. As this Court recognized when it remanded this case, 542 U.S. at 175 (Pet. App. 45a), the essence of petitioners' argument is that the "but for" relationship they allege between U.S. prices and their foreign

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[3] This Court's review of rulings after remand in other cases (cf. Pet. 9 n.2) does not support granting the petition in this case; indeed, the Court frequently declines to review such rulings. See, *e.g.*, *Fellers v. United States*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (denying petition for review of ruling after remand); *Chavez v. Martinez*, 542 U.S. 953 (2004) (same); *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 541 U.S. 1086 (2004) (same). None of the cases cited by petitioners suggests that the petition should be granted here. In *Johnson v. California*, 125 S. Ct. 2410 (2005), the Court granted review after a jurisdictional defect that had initially required dismissal had been cured. In *Scheidler v. NOW, Inc.*, 537 U.S. 393, 399–400 (2003), the Court granted certiorari a second time on unrelated issues independently worthy of review after extensive proceedings in the lower courts, including a seven-week trial; the Court granted certiorari a third time to address profound confusion by the court of appeals as to whether plaintiffs' claims survived the Court's prior decision, see *Operation Rescue v. NOW, Inc.*, 125 S. Ct. 2991 (2005). In the other cases cited by petitioners, the court of appeals plainly disregarded an earlier decision of this Court. See *Miller-El v. Dretke*, 125 S. Ct. 2317, 2335 (2005) (observing that the court of appeals' opinion on remand rested on an argument "first advanced in dissent when the case was last here"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing ruling that disregarded this Court's prior opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)). None of these cases suggests that the standard for granting review after remand is different than in other cases or supports granting the petition here.

injuries satisfies the FTAIA. Indeed, the Court remanded the case for the D.C. Circuit to consider precisely that argument. Petitioners' litigation choice to abandon that argument below precludes them from making it now (and thus they strain to portray their injuries as the proximate result of higher U.S. prices). Yet the real issue presented here remains whether the "but for" relationship petitioners allege satisfies the FTAIA, a question foreclosed by petitioners' concession below. Accordingly, even if review of that question were warranted (and it is not), this case provides no occasion to reach it.

I. THERE IS NO CONFLICT IN THE COURTS OF APPEALS.

The decision below does not conflict with any decision of any other court of appeals. Only one other court of appeals has addressed the question decided below, and that court determined, like the D.C. Circuit, that the Sherman Act does not permit recovery for foreign injuries unless they were proximately caused by anticompetitive conditions in the United States. Both courts of appeals deemed insufficient foreign plaintiffs' allegations of an international market, a transnational cartel and "interdependence" between the cartel's U.S. effects and the foreign effects that caused the plaintiffs' foreign injuries. No court of appeals has reached a contrary conclusion. The courts of appeals are thus unanimous in the view that the FTAIA cannot be satisfied by allegations that the effect of price-fixing on U.S. commerce was a "but for" cause of foreign injuries. This consensus belies any need for review of the decision below.

In an opinion issued before this Court's ruling in *Empagran*, the Fifth Circuit rejected essentially the same arguments that petitioners make here. *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The plaintiff in *Den Norske* was a Norwegian oil company that had purchased heavy-lift barge services in the

North Sea. It alleged that the barge-service providers had engaged in a global conspiracy to fix bids and allocate customers and territories. Like petitioners here, the *Den Norske* plaintiff argued that the cartel's effect on U.S. commerce was a contributing cause of its foreign injury. It alleged that "the market for heavy-lift services in the world is a single, unified, global market" and that, "because the United States is a part of this worldwide market, the effect of the conspiracy, whether in the United States or in the North Sea, 'gives rise' to any claim that is based upon this conspiracy." *Id.* at 425.

The Fifth Circuit rejected that argument. It was not enough, it concluded, that the plaintiff had alleged "a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea." *Id.* at 427. The court determined that the FTAIA's "gives rise to" language "requires more than a 'close relationship' between the domestic injury and the plaintiff's claim," *id.*, and that the alleged "but for" causal connection was not sufficient. The court noted, moreover, that "[a]ny reading of the FTAIA authorizing jurisdiction over [the plaintiff's] claims would open United States courts to global claims on a scale never intended by Congress." *Id.* at 431.

The Fifth Circuit's reasoning and conclusions are entirely consistent with the D.C. Circuit's, and no other circuit court has reached a contrary result. The only other circuit court to face the question whether a "but for" causal relationship between a U.S. effect and a foreign injury can satisfy the FTAIA disposed of the case without deciding it. See *Sniado v. Bank Austria AG*, 378 F.3d 210, 212–13 (2d Cir. 2004) (holding that jurisdiction was lacking over plaintiff's claim because his assertion that his foreign injury was "not independent" of the conspiracy's effect on U.S. commerce was "too conclusory to avert dismissal"). There is, in short, no confusion or difficulty suggesting that guidance by this Court is needed. To the contrary, like the courts of appeals, the district courts are unanimous in their rejection of argu-

ments that the FTAIA can be satisfied by "worldwide market" allegations that posit a "but for" relationship between U.S. prices and prices charged in foreign countries. This consistency throughout the federal courts demonstrates that review is unnecessary and unwarranted.[4]

II. THE COURT OF APPEALS FOLLOWED THIS COURT'S PRIOR DECISION IN THIS CASE AND CORRECTLY HELD THAT THE SHERMAN ACT DOES NOT APPLY TO PETITIONERS' CLAIMS.

The court of appeals faithfully followed this Court's prior *Empagran* ruling, which sets forth the considerations courts are to weigh in interpreting and applying the FTAIA. As this

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[4] Every district court that has addressed the issue has determined that allegations of "worldwide markets" or "international" cartels are inadequate to show that a U.S. effect gave rise to a plaintiff's foreign injury. See *In re Monosodium Glutamate Antitrust Litig.*, No. 00-MDL-1328 (PAM), 2005 WL 2810682, at *1 (D. Minn. Oct. 26, 2005) (dismissing antitrust claims by purchasers of MSG and nucleotides outside the United States despite allegations "that MSG and nucleotides are fungible and globally marketed," and that defendants could "sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States"); *id.* at *3 ("The global price-fixing cartel theory establishes only an indirect relationship between United States prices and the prices paid in foreign markets. As such, Plaintiffs can only show that the foreign effect of price-fixing gave rise to their injuries."); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03 Civ. 10312 (HB)(DF), 2005 U.S. Dist. LEXIS 19788, at *32 (S.D.N.Y. Sept. 7, 2005) (holding that allegations of "an interchangeable commodity" and a "worldwide geographic market where price movements in one geographic sub-market would have a ripple-effect on prices in other geographic sub-markets" are inadequate to show that foreign injuries arose from a U.S. effect); *eMag Solutions, LLC v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084, at *8 (N.D. Cal. July 20, 2005) (to same effect); cf. *MM Global Servs., Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337, 339 (D. Conn. 2004) (declining to dismiss antitrust claims because the plaintiffs allegedly "purchased * * * products *in the United States*") (emphasis added).

Court had done in *Empagran*, the court of appeals construed the FTAIA in light of international comity concerns and the statute's purpose, as described by this Court, "to clarify, perhaps to limit, but certainly not *to expand*" the extraterritorial reach of U.S. antitrust law. 542 U.S. at 169 (Pet. App. 39a). The court of appeals' decision is entirely consistent with this Court's *Empagran* decision, with considerations of international comity and with the text and purpose of the FTAIA. Not surprisingly, it also is consistent with the views of the United States, the Federal Trade Commission and the various foreign nations that submitted briefs both previously in this Court and in the court of appeals, all of which urged the result reached below. Against this united front, petitioners advance policy arguments that have no basis in the statute's text and are contrary to the unanimous views of every governmental authority that has spoken.

A. The Comity Considerations Cited by This Court in Its Prior Decision Fully Support the Decision Below.

The considerations of international comity on which this Court relied in *Empagran* fully support the court of appeals' construction of the FTAIA. This Court noted in *Empagran* that even foreign countries that agree with the United States' prohibition of price-fixing may "disagree dramatically about appropriate remedies" for violations and, further, that the extension of U.S. antitrust remedies to anticompetitive conduct abroad "has generated considerable controversy." 542 U.S. at 167 (Pet. App. 37a). Indeed, in both the prior proceedings in this Court and in the circuit court below, several foreign nations, including the leading trading partners of the United States, have urged that the Sherman Act not be applied to petitioners' claims, and that those claims should instead be governed by the competition policies, including the remedies, adopted by the countries where petitioners reside or purchased vitamins. In the long history of this case, no

government has supported petitioners or any of the various arguments they have advanced.

In *Empagran*, this Court reaffirmed the interpretive principle that ambiguous statutes should ordinarily be construed "to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164 (Pet. App. 34a). This principle derives from the concept of "prescriptive comity," which dictates that nations may reasonably regulate conduct outside their borders to prevent or remedy adverse domestic effects but cannot reasonably regulate foreign conduct absent such a purpose. *Id.* at 164–65 (Pet. App. 34a–36a). In keeping with these principles, the extraterritorial application of U.S. antitrust law has always been justified by the need "to redress *domestic* antitrust injury" caused by anticompetitive conduct outside the United States. *Id.* at 165 (Pet. App. 35a) (emphasis in original). Weighing these considerations, this Court concluded in *Empagran* that U.S. antitrust laws could not reasonably regulate conduct outside the United States that caused foreign injuries unrelated to any effect of anticompetitive conduct on the United States. Regulation of conduct that injures persons in foreign countries by affecting foreign economies is, this Court concluded, properly the province of foreign law. "Why should American law," the Court asked, "supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British of Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Id.* (Pet. App. 35a).

Petitioners' alternative jurisdictional theory fails to answer that question, as the court of appeals correctly concluded. Applying U.S. antitrust law to petitioners' foreign transactions would unreasonably interfere with the prerogative of foreign sovereigns to regulate foreign conduct, because it would not "redress *domestic* antitrust injury." *Id.* (Pet. App. 35a) (emphasis in original). Petitioners' foreign injuries were proximately caused by anticompetitive conditions in foreign

countries. Petitioners argue that the cartel needed to raise U.S. prices to maintain higher prices abroad, but it was the alleged effect of price fixing on Australia, Ecuador, Panama and Ukraine, not on the United States, that directly and primarily caused the injuries petitioners sustained in those countries. Petitioners are not U.S. persons; they did not purchase or even seek to purchase from a U.S. person; and their purchases did not take place in U.S. domestic, export or import commerce. Petitioners' foreign injuries are principally, perhaps even exclusively, a matter of concern for the foreign nations where petitioners reside or where they purchased vitamins from foreign sellers. They are not of sufficient concern to the United States to justify the extraterritorial application of U.S. law to that foreign conduct. See *id.* (Pet. App. 35a).

Having conceded below that the FTAIA requires that a U.S. effect proximately caused their foreign injuries, petitioners strain to assert that fixed prices in the United States proximately caused them to pay higher prices in foreign countries. Pet. 14–17. But their allegations do not support this claim. The relationship they allege is one of "but for" causation, as this Court recognized in remanding the case to the D.C. Circuit. 542 U.S. at 175 (Pet. App. 45a) (describing petitioners' complaint as alleging that the U.S. effect was a "'but for' condition"). Foreign market effects, not any U.S. effect, were the proximate causes of petitioners' injuries, and accordingly foreign law, not U.S. law, should regulate the foreign transactions in which they participated.

Petitioners' various efforts to portray their injuries as the proximate result of the cartel's U.S. effects all fail. Petitioners argue that they were directly injured by the cartel, quoting at length from the circuit court's vacated initial opinion. Pet. 13. But allegations that the *cartel* proximately caused their injuries is irrelevant to the jurisdictional test under the FTAIA; the statute requires petitioners to show that the cartel's *effect* on the United States caused their injuries. That is the holding of *Empagran*. Petitioners cannot collapse the distinction that

the statute draws between conduct and the effect of that conduct on the United States. It is the latter, not the former, that must "give[] rise to" injury under the FTAIA.

Indeed, in related contexts, this Court has rejected the sort of chain-of-effects theory of causation that allegedly connects petitioners' foreign injury to a U.S. cause. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court explained that the antitrust laws do not "provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 534 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)); see also *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266–70 (1992) (rejecting a "but for" causation standard in RICO context based on antitrust precedent). Petitioners' argument that the cartel's effect on the United States made it possible to maintain the effect on foreign countries that proximately caused their injuries describes precisely the sort of attenuated chain of causation found insufficient in these cases. Petitioners' attempt to recast this "but for" condition as proximate cause would effectively nullify the fundamental jurisdictional limitations of the FTAIA.

Nor does petitioners' allegation that the cartel raised U.S. prices with the intention of injuring petitioners in foreign countries (Pet. 14–17) transform this "but for" condition into a proximate cause. This argument simply paraphrases petitioners' basic allegation that, because there is a "worldwide market" for vitamins, respondents needed to raise prices in the United States in order to raise them abroad. Even if prices had been fixed in the United States to enable foreign injuries, the U.S. pricing was still merely a "but for" cause of those injuries. As this Court has previously held, an action intended to lead to a particular result is not necessarily the proximate cause of that result. See, *e.g.*, *Associated General*, 459 U.S. at 537 ("The availability of the [Clayton Act] § 4 remedy to some person who claims its benefit is not a ques-

tion of the specific intent of the conspirators.") (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982)).[5]

Beyond this, petitioners' proposal to condition the applicability of the Sherman Act on whether products are economically fungible across particular geographic regions (Pet. 15–16), or whether in a particular case a cartel's subjective intent in raising U.S. prices was to maintain higher prices abroad (Pet. 17), is contrary to *Empagran*'s admonition that the FTAIA's jurisdictional rule be applied "simply and expeditiously." 542 U.S. at 169 (Pet. App. 39a). Determining in every case whether injuries to foreign purchasers were "dependent" on U.S. effects, or were an intended consequence of them, would require courts to grapple with the "enormous complexities of market definition," *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430–31 (1990), as a threshold jurisdictional inquiry. In this case, for example, a court considering petitioners' worldwide market theory would have to evaluate cross-elasticities of demand for different vitamin products over ten years, in different countries, each having its own economic features, simply to assess the allegation that higher U.S. prices were essential to maintaining higher prices in each of the foreign countries in which petitioners purchased vitamins. As this Court noted in

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[5] See also *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir. 2003) ("This is too remote to satisfy the proximate cause requirements because the directness inquiry is not a question of specific intent."), *cert denied*, 541 U.S. 1037 (2004); *SEIU Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1074 (D.C. Cir.) ("[T]he circuits have rejected the contention that specific intent is sufficient to demonstrate proximate cause."), *cert. denied sub nom. Guatemala v. Tobacco Inst., Inc.*, 534 U.S. 994 (2001); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 242 (2d Cir. 1999) (noting that "an allegation of specific intent does not overcome the requirement that there must be a direct injury to maintain this action," and that the contrary view has been "specifically rejected" by this Court), *cert. denied*, 528 U.S. 1080 (2000).

Empagran, the "procedural costs and delays" of such fact-intensive, case-by-case inquiries can "themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." 542 U.S. at 168–69 (Pet. App. 39a). Petitioners' proposal to make jurisdictional determinations turn on case-by-case assessments of the markets for particular products or the violators' subjective intent is simply "too complex to prove workable." *Id.* at 168 (Pet. App. 38a).[6]

In sum, petitioners' argument ignores the sovereign interests of our trading partners and would turn U.S. courts into world courts for competition claims. To apply U.S. law, including U.S. treble-damages remedies, to transactions between foreign buyers and foreign sellers in foreign countries with different antitrust policies, including different liability and damages rules, would be inconsistent with principles of prescriptive comity and would unreasonably threaten the "harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164–65 (Pet. App. 35a).

B. Antitrust Precedent Further Supports the Court of Appeals' Determination That Only Foreign Injuries Proximately Caused by a U.S. Effect Are Actionable.

This Court explained in *Empagran* that Congress enacted the FTAIA in 1982 to "clarify, perhaps to limit, but certainly not *to expand*" the extraterritorial reach of the antitrust laws. 542 U.S. at 169 (Pet. App. 39a). Given this purpose, the Court concluded that the absence of any "significant author-

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[6] Petitioners' argument that their "worldwide market" theory is necessarily limited to cases involving the cartelization of commodities (Pet. 23) is refuted by *Den Norske*, where the plaintiff alleged a "single, unified, global market" for "heavy-lift barge services." 241 F.3d at 425. Petitioners' "but for" causation argument cannot be limited to any class of cases; it is the exception that would swallow the rule.

ity" in 1982 for applying the Sherman Act to claims based on injuries unrelated to any U.S. effect weighed heavily against interpreting the FTAIA to permit application of the Sherman Act to such claims. *Id.* at 173 (Pet. App. 43a). This lack of precedent for petitioners' claims further supports the decision below and is further reason to deny the petition.

The D.C. Circuit examined three cases suggesting circumstances when a U.S. effect might "give rise to" a foreign injury. See *supra* pp. 7–8. None of those cases relied on a "worldwide market" theory or "but for" chain of causation to link foreign injury to a U.S. effect; rather, in each case, the plaintiff's injury arose directly from the U.S. effects of a restraint of U.S. commerce. Pet App. 5a–6a. The circuit court correctly concluded, as had the United States, that none of these cases supports the application of the Sherman Act here. Indeed, petitioners cite only one of these cases as support for their petition, this Court's decision in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978). Pet. 12, 18–19. But *Pfizer* in no way supports petitioners' claims.

Pfizer decided the question whether a foreign state is a "person" entitled to sue under the Clayton Act. 434 U.S. at 312. It answered that question, as the court of appeals correctly noted below, "without addressing the requisite causal relationship between domestic effect and foreign injury." Pet. App. 5a. While the *Pfizer* Court explained that its ruling would advance deterrence, it never suggested that U.S. antitrust law provides a remedy for injuries resulting from the effects of anticompetitive conduct on foreign economies. To the contrary, the Court explained its ruling in part on the ground that U.S. antitrust law should protect a foreign person that "enters *our commercial markets*," 434 U.S. at 318 (emphasis added), as apparently was the case in *Pfizer*.[7] That

[7] As Judge Higgenbotham noted in his dissent from the Fifth Circuit's decision in *Den Norske*, "[u]nlike in this case, in *Pfizer* the sales were made in the United States." 241 F.3d at 434–35.

statement fully supports the court of appeals' conclusion that a U.S. effect must be the proximate cause of the plaintiff's harm. And it fully supports the conclusion that petitioners—who did not enter our markets, did not participate in U.S. domestic or export commerce and did not even attempt to do so—were not proximately injured by any effect on U.S. commerce.

In each of the other two cases that the court of appeals identified as applying the Sherman Act to foreign injury, the foreign plaintiff was a participant (or prospective participant) in U.S. commerce and was proximately injured by the effects of anticompetitive conduct on U.S. commerce. In *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*, No. 75 Civ. 5828-CSH, 1977-1 Trade Cas. (CCH) ¶ 61,256, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), the plaintiff was an Italian purchaser of services exported from the United States, and its injuries arose directly from anticompetitive conduct that limited competition among U.S. exporters. Petitioners, by contrast, have not alleged that they purchased or even attempted to purchase vitamins from the United States.[8] In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), a post-FTAIA case, the plaintiff was a British Virgin Islands

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[8] The plaintiff in *Industria Siciliana* complained that Exxon had conditioned an important oil refining contract on acceptance of another Exxon subsidiary's bid for refinery design services, which was higher than the competing bid of another U.S. company. The allegations showed that Exxon had used its market power as a crude oil supplier to "restrai[n] competition in the United States refinery design and engineering market," *id.* at *3, and that the plaintiff "was injured in its business by reason of an alleged restraint of our domestic trade" involving "the export of services," *id.* at *12. Notably, the legislative history of the FTAIA refers critically to *Industria Siciliana* as one of several lower court cases that reached too far in permitting claims by purchasers of U.S. exports. H.R. Rep. No. 97-686, at 5 (1982). The FTAIA provides particular rules, not implicated here, regarding conduct that affects U.S. export commerce. 15 U.S.C. § 6a.

company that sold radio advertising in the Eastern Caribbean to U.S. purchasers, and its injuries arose directly from anti-competitive conduct by a competitor that interfered with those sales. Petitioners, by contrast, were not excluded from transactions with U.S. market participants, and thus their claims are entirely dissimilar.

There is no precedent for petitioners' novel jurisdictional theory. No decision accepts their "worldwide market" theory of jurisdiction; nor is there any support in the case law for applying the Sherman Act to claims where a foreign injury was an indirect, albeit "intended," result of a restraint of U.S. commerce. The one case they do cite, *Pfizer*, does not support their position, given the narrow ruling in that case. Petitioners accordingly have failed to identify the "significant authority" that this Court said in *Empagran* would be required to conclude that their claims satisfy the FTAIA. 542 U.S. at 173 (Pet. App. 43a). To the contrary, the case law supports the court of appeals' determinations that the FTAIA's "gives rise to" standard requires a showing that a U.S. effect proximately caused a foreign injury, and that petitioners' allegations show, at most, a "but for" causal relationship that fails to meet the FTAIA's proximate cause test.

C. Petitioners' Policy Arguments Are Contrary to the Views of the United States and Every Foreign Government That Has Participated in These Proceedings.

Much of the petition is devoted to a policy argument, based almost entirely on allegations outside the record, that applying the Sherman Act to claims by petitioners and others in analogous circumstances will deter global cartel behavior or vindicate important economic interests. Pet. 18–24. These policy claims, which petitioners also made unsuccessfully in *Empagran*, are refuted by the United States, the Federal Trade Commission and the foreign governments that submitted briefs in the prior proceedings in this Court and in the

court of appeals. They provide no basis for review of the decision below.

The United States and the various foreign governments that have participated in these proceedings as *amici* in support of respondents (despite, in some cases, having prosecuted some of them) have unanimously disputed petitioners' argument that applying the Sherman Act to their claims is essential to deter global cartels. Indeed, they explain that petitioners' proposed construction of the FTAIA would discourage cooperation by violators and thus ultimately make it harder for antitrust enforcement authorities to detect illegal activity.

The Department of Justice and the Federal Trade Commission have stressed that the Corporate Leniency Program, which permits a cartel member to avoid criminal prosecution by being the first to cooperate with an investigation of the cartel, is one of the strongest tools in the fight against illegal anticompetitive conduct. U.S. Br. at 19. Cooperation secured through the program has been an important factor in investigations of anticompetitive conduct, including the price-fixing of vitamins that underlies petitioners' complaint. *Id.* at 1, 20.

According to the United States, increased liability under the Sherman Act for worldwide injuries would seriously impair the effectiveness of such programs by raising the costs of cooperation for potential cooperating witnesses, who remain exposed to civil claims. As *amici* noted below, "[i]n the government's experience, potential amnesty applicants weigh their civil liability exposure when deciding whether to come forward and seek amnesty." *Id.* at 20. "If consumers from around the world suddenly could bring class action suits in U.S. courts against international cartels * * * the massive increase in potential civil liability would radically tilt the scale of incentives for conspirators against seeking amnesty." *Id.* Without these informers, more illegal activity will go un-

detected, harming consumers in the United States and worldwide.

Petitioners' premise that they "are the only available enforcers of antitrust laws in the circumstances of this case" (Pet. 19) is simply untrue. Numerous foreign governmental authorities have prosecuted the vitamins cartel in foreign countries, and in some jurisdictions private plaintiffs have brought suit as well (in actions that include at least one of the petitioners as a party). *See supra* pp. 3–4. Nor does it help petitioners that some nations' laws do not provide private damages remedies or that trebled damages are not available outside U.S. law. Cf. Pet. 21 n.6. It is precisely because other nations have adopted different policies regarding the regulation of competition, in particular different damages remedies, that the application of U.S. law would offend international comity. See *Empagran*, 542 U.S. at 169 (Pet. App. 39a) ("[I]f America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."). The "harm done to, and the unlawful profits gained from, overseas consumers" (Pet. 19) are not proper considerations of U.S. law when those harms arise from the effects of anticompetitive conduct on foreign markets. They are matters to be addressed under the laws of the jurisdictions where those overseas consumers were injured.

Nor is it persuasive for petitioners to argue that, if they are unable to sue, "harm to * * * U.S. indirect purchasers who buy from them would go unremedied." Pet. 20. In *Empagran*, this Court held that the Sherman Act does not apply to claims based on foreign injuries that do not arise from a U.S. effect. Neither *Empagran* nor the FTAIA permits any exception to this rule based on the mere presence of U.S. indirect or downstream purchasers. Such an exception would impermissibly "swallow" a fundamental jurisdictional limitation

whole, something this Court warned against in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702–03 (2004). See also *id.* at 758–60 (Ginsburg, J., concurring). More generally, Congress has already determined that indirect effects of foreign anticompetitive conduct on the United States fall outside the scope of U.S. antitrust concern. The FTAIA expressly limits the Sherman Act's extraterritorial reach to foreign conduct that has a "*direct*, substantial, and reasonably foreseeable" effect on U.S. commerce. 15 U.S.C. § 6a(1) (emphasis added).[9]

Faced with essentially the same arguments in *Empagran*, this Court explained that it was unable to weigh the competing policy considerations, which turned on questions of empirical fact. It also deemed them largely beside the point. Whatever the merits of the policy debate, the Court explained, the paramount considerations for purposes of construing the FTAIA are principles of prescriptive comity and Congress' intent "to clarify, perhaps to limit, but not *to expand*" the extraterritorial reach of the Sherman Act:

> "We cannot say whether, on balance, [petitioners'] side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion." 542 U.S. at 174–75 (Pet. App. 44a–45a).

None of the policy arguments advanced by petitioners supports a different view here. The court of appeals correctly determined that the considerations of comity and congres-

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[9] Petitioners' argument that they should be entitled to assert Sherman Act claims in order to vindicate harms to U.S. export commerce (Pet. 20) is incompatible with the FTAIA's express limitation of claims based on effects on U.S. export commerce to claims of injury by U.S. exporters. 15 U.S.C. § 6a(1)(B).

sional intent that guided this Court's decision in *Empagran* dictated the conclusion that petitioners' injuries lack the causal connection to the United States that is necessary for the Sherman Act to apply.

Finally, there is no merit to petitioners' alarmist claims about the scope of the ruling below. The court below appropriately applied the FTAIA, informed by important comity considerations emphasized by this Court and antitrust precedent, to limit claims based on foreign injuries to cases where those injuries arise directly from an effect on U.S. commerce.

III. HAVING CONCEDED THAT FOREIGN INJURIES ARE ACTIONABLE ONLY IF THEY WERE PROXIMATELY CAUSED BY AN EFFECT ON U.S. COMMERCE, PETITIONERS CANNOT NOW ASSERT THAT "BUT FOR" CAUSATION SUFFICES

This Court remanded this case to the D.C. Circuit to consider petitioners' alternative jurisdictional theory that their "worldwide market" allegations satisfied the FTAIA's requirement that a U.S. effect "give[] rise to" their claims. 542 U.S. at 175 (Pet. App. 45a). As the Court noted, this theory posits that "higher prices in the United States" were a "'but for' condition" of petitioners' foreign harm. *Id.* (Pet. App. 45a). The question for the court of appeals on remand was accordingly whether such a "but for" condition satisfied the FTAIA.

In the court of appeals, however, all parties and the circuit court agreed that the FTAIA requires that a U.S. effect was the proximate cause of a foreign injury. See *supra* p. 7 & n.1. And the court of appeals quite sensibly ruled that (as this Court had previously indicated) petitioners' allegations described only a "but for" connection to U.S. effects and thus could not satisfy that standard. Nor could the circuit court possibly have concluded otherwise, given the international

comity concerns that this Court recognized in *Empagran*. How could foreign nations possibly control competition policy in their own countries if participants in transactions in those countries could invoke U.S. antitrust law simply by alleging that a cartel's U.S. effects were necessary to avoid international arbitrage in the affected product?

Petitioners' concession on the issue that the court of appeals was asked to decide weighs heavily against review. As a result of that litigation choice, petitioners cannot now argue that the FTAIA is satisfied by a showing of "but for" causation. This limitation makes this case a poor vehicle for review. Even if the Court thought it worthwhile to consider whether "but for" or proximate causation is the standard under the FTAIA, it should not do so in this case, where that question is foreclosed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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November 28, 2005

3

No. 05-541

IN THE

Supreme Court of the United States

Empagran, S.A. et al.,
Petitioners,

v.

F. Hoffmann-LaRoche Ltd. et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF FOR THE PETITIONERS

This Court previously deferred ruling on the most important issue presented by this case: whether the Sherman Act applies to claims by victims of international cartels based on the cartel's conduct in this country when those victims made purchases from the cartel overseas. Because the D.C. Circuit had not addressed that question, this Court left it to be considered on remand in the first instance. The issue having now been decided, certiorari should be granted to provide needed certainty and clarity on an issue that is of unquestioned importance to the application of the antitrust laws in an era of rapidly expanding international trade.

The respondents' arguments, if anything, reinforce the importance of the case and, as a consequence, the basis for review in this Court. Respondents emphasize at length that the Federal Trade Commission and certain foreign governments participated as *amici* on remand, thereby demonstrating the recognition by those governmental officials that this is a case of unique importance to the international antitrust community. By the same token, numerous international antitrust and international law experts have filed as *amici* supporting petitioners in the case. See Pet. 15 n.5, 17, 20.

Nor do respondents dispute either that this Court could review the question with unusual efficiency or that its decision would provide considerably greater clarity than the D.C. Circuit's single, unelaborated paragraph of discussion. The Court has received full briefing on the issue once already. Were it not for the general practice of permitting a court of appeals to consider issues in the first instance, the question presented no doubt would have been finally resolved when the case was last in this Court.

Respondents' arguments for nonetheless denying certiorari lack merit. Respondents seize on this Court's use of the phrase "but for" in its prior opinion (Pet. App. 45a) to falsely assert that petitioners, while having agreed below that "proximate cause" is necessary, now argue only that "but for" cau-

sation is required. BIO 2, 3, 10, 26-27. This argument misconstrues this Court's opinion and misrepresents petitioners' position. Petitioners did not previously argue in this Court that "but for" causation was all the Sherman Act required – which is why respondents cannot point to anything in petitioners' briefing or oral argument to that effect – and this Court simply used that term as loose shorthand. Petitioners' position has always been that proximate cause is required and that proximate cause has been demonstrated in this case. In fact, respondents do not even seriously embrace their own argument, as they spend pages attempting to respond to petitioners' argument that "their injuries [were] the proximate result of the cartel's U.S. effects." BIO 16; see *id.* 16-19.[1]

Indeed, respondents' brief – like the court of appeals' decision it defends – elides the essence of the question presented: *what is* proximate cause in the context of a cartel suit, and why don't these petitioners' allegations qualify? Petitioners' suit is directed at conduct in this country: both respondents' price fixing and their market allocation agreements. Petitioners furthermore allege – and the cartel's structure confirms – that respondents *intended* their conduct in this country to injure purchasers abroad, and moreover that the cartel otherwise would have collapsed in the United States and elsewhere.[2]

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[1] Respondents' throwaway assertion that the D.C. Circuit made a "case-specific determination" about whether petitioners could state a claim (BIO 9) is both unexplained and inexplicable. The court of appeals unquestionably adopted a categorical rule applicable to cartel claims. Pet. App. 7a-8a.

[2] Petitioners' position is not that "an action intended to lead to a particular result" is, of itself, "necessarily the proximate cause of that result." Contra BIO 17. Rather, as the cases respondents cite recognize, the defendant's intent to cause an injury is certainly a relevant component of the proximate cause inquiry. That was the conclusion of this Court in *Associated General Contractors* in language respondents omit: "We are also satisfied that an allegation

Respondents' principal answer is that their conduct in this country cannot be deemed the proximate cause of petitioners' injury because the price increases overseas were a *more* direct cause. The closest they ever come to offering a definition of proximate cause is thus their assertion that "it was the alleged effect of price fixing on Australia, Ecuador, Panama and Ukraine, not on the United States, that directly and primarily caused the injuries petitioners sustained." BIO 16. But respondents cite no authority for this "directly and primarily" standard, no doubt because it rests on a fallacy: the fact that overseas price-fixing was a proximate cause does not negate the conclusion that the cartel activity in this country that is the subject of this suit is *also* a proximate cause. To the contrary, it is commonplace for injuries to have "multiple proximate causes." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004). "Proximate cause is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and *frequently is not*, the exclusive proximate cause of harm." *Ibid.* (emphasis added). It might be a different matter if the higher prices petitioners paid overseas were the consequence of unrelated conduct by a third party. Such an independent, intervening event could conceivably be regarded as the exclusive "proximate cause" of the harm. But this case of course is entirely

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of improper motive, although it may support a plaintiff's damages claim under § 4 [of the Clayton Act], is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated Gen. Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 537 (1983). The courts of appeals decisions cited by respondents hold, as did *Associated General Contractors*, that intent is not a substitute for a finding that the plaintiffs were injured directly by the defendant's conduct. BIO 18 n.5. In this case, however, it is undisputed that petitioners are direct purchasers.

different – the higher prices overseas were imposed *by respondents* pursuant to the *same cartel agreement*.[3]

There is every reason to believe that petitioners' claims are "close enough to the harm to be recognized by law." *Sosa*, *supra*. The petition demonstrated – and respondents notably do not dispute – that Congress enacted the Sherman Act specifically to target cartels. Moreover, cartel claims like those brought by petitioners here are essential to fulfilling the purpose of the Sherman Act: protecting American consumers. Thus, respondents will net approximately *$10 billion in profits* if the judgment below is not reversed, despite having been caught red-handed. That is a recipe for non-deterrence. Few cartels will be deterred from inflicting billions of dollars of illegal costs on U.S. consumers when doing so permits the cartel to secure many billions more from abroad, if all the defendants risk if caught is the loss of their U.S. profits.[4] Re-

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[3] Respondents' contrary position that only the most direct cause of injury is actionable under the antitrust laws would also eviscerate the long-settled "effects doctrine," which this Court previously reaffirmed in this case, and under which overseas conduct is subject to Sherman Act liability for injuries that result from particular sales transactions in this country. See Pet. App. 35a. On respondents' view, the overseas anticompetitive conduct targeted by the effects doctrine is not the "proximate cause" of injury suffered in this country through higher prices paid here, and hence is not illegal.

[4] We recognize that the Department of Justice has suggested that damages may discourage participation in the government's amnesty program. Congress recently addressed this concern through legislation, however, by providing that amnesty participants will not be subject to treble damages. See Scott D. Hammond, Deputy Ass't A.G., "An Update of the Antitrust Division's Criminal Enforcement Program," available at www.usdoj.gov/atr/public/speeches/213247.htm (Nov. 16, 2005) (Antitrust Criminal Penalty Enhancement and Reform Act "enhances the incentive for corporations to self report illegal conduct by limiting the damages recoverable from an applicant to the Divi-

spondents accordingly have no answer to a basic question: How can it possibly be that Congress would have intended to preclude cartel claims while permitting the claims that respondents identify as demonstrating "proximate cause," none of which further the interests of U.S. consumers in any serious respect? See BIO 20-22.

Importantly, petitioners do not rely on a "chain-of-effects theory of causation." Contra BIO 17. In the case respondents cite, the plaintiffs sought recovery as indirect purchasers. *Ibid.* (citing *Associated Gen. Contractors*). But even the D.C. Circuit recognizes that petitioners are direct enforcers of the antitrust laws. See Pet. 13 (quoting Pet. App. 81a-82a). There is *no party*, for example, that was more directly injured by respondents' market-allocation agreement not to export vitamins from the United States to other markets. The other possible plaintiffs are themselves members of the conspiracy. See *id.* 19.

Respondents' related argument that the Sherman Act was not intended to protect overseas consumers simply rests on another fallacy, one that this Court expressly identified in *Pfizer* v. *Government of India*, in reasoning that is expressly embraced by the Conference Report on the FTAIA:

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sion's Corporate Leniency Program, that also cooperate with private plaintiffs in their damage actions against remaining cartel members, to the damages actually inflicted by the amnesty applicant's conduct."). The government's broader argument – that each dollar of civil liability reduces deterrence by discouraging amnesty participation – is grossly overbroad, as it is equally an argument against both (a) civil liability in domestic antitrust cases, and (b) the new foreign liability schemes that have been adopted by some countries and that respondents and the government embrace as valuable deterrents. In any event, this argument indisputably has no bearing on the statutory construction question before this Court, as the Department of Justice created the relevant amnesty program well after Congress enacted the FTAIA.

> The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

434 U.S. 308, 314 (1978); H.R. Rep. 97-686, at 10.

To the extent that this Court's prior opinion in this case sheds light on the question now presented, it supports petitioners' reading of the antitrust laws. Respondents fail to understand the significance of their recognition that this Court's prior decision "concluded that applying U.S. antitrust law to *foreign conduct* would be unreasonable when the plaintiffs' injuries were not caused by the effect of such conduct on U.S. commerce." BIO 5 (emphasis added). The Court's prior decision necessarily was directed at "foreign conduct" because there was – on the narrow factual premise of the opinion – no link between the defendants' "domestic conduct" and the plaintiffs' injuries overseas. Now, by contrast, the case is focused on the circumstances in which U.S. interests are at their apex – *viz.*, when the plaintiffs' injuries arise from the effect of defendants' conduct in this country, effects that impose serious injuries on American consumers in order to make possible further cartel profits abroad. Thus, this is not a case in which plaintiffs complain about price-fixing in a foreign country that has effects only upon foreign consumers and businesses. The factual premise of petitioners' present claim – a premise that respondents do not in this Court deny – is that respondents were able to extract cartel prices here and abroad only if they maintained cartel prices and market-allocation agreements in the United States. In this context, in which U.S. markets are manipulated and U.S. consumers are injured as a means of securing cartel profits worldwide, the sovereign interests of the United States are overwhelming.

Respondents' remaining argument is that applying the Sherman Act in this targeted context is an affront to comity. But as the petition for certiorari demonstrated, that is incorrect as a matter of settled international law: petitioners' claims arise from conduct in this country, and there is no conflict in the various affected nations' substantive law, all of which forbid cartel activity. It is settled that U.S. law properly applies in this circumstance. Indeed, the basis for the assertion of U.S. jurisdiction is stronger in this circumstance than in cases arising under the effects test, for in the latter cases, the proscribed conduct does not even occur in this country. See generally Pet. 24 & n.7.

But in any event, respondents' argument is entirely overbroad. The petition demonstrated – and again respondents do not deny – that respondents' foreign governmental *amici* represent the minority of jurisdictions with developed antitrust regimes. See Pet. 20-21 & n.6; Oral Arg. Trans., No. 03-724, *F. Hoffmann-LaRoche* v. *Empagran* 13-14 (QUESTION: "But surely there – there are other partners who have not been heard from. * * * * These are nations with – with fairly effective antitrust laws and antitrust enforcement. * * * * What about the majority of nations that don't have effective antitrust enforcement, if indeed they have any antitrust laws?"). There is a consensus among domestic and international authorities that existing remedial schemes simply do not sufficiently deter cartels, *ibid.* – a conclusion that is borne out by the immense profits that respondents seek to retain from their illegal conduct in this case. There may be an argument that the claims of plaintiffs who reside in countries with functioning antitrust regimes should be dismissed as a matter of comity. But that is an entirely different question from the one decided by the court of appeals on remand in this case. Respondents' argument does not require employing the sword of broadly sacrificing the interests of U.S. consumers when the concerns of its *amici* can be fully accommodated with the scalpel of a comity principle that permits a particular

subset of plaintiffs to pursue their claims abroad in the rare circumstance that such a forum is available.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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